

## Gilbert Jewel

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**From:** Grimwade Tim  
**Sent:** Sunday, 14 September 2003 1:55 PM  
**To:** Palisi Paul; Mayrhofer, Tania; Chenoweth Stephanie; Gilbert Jewel  
**Subject:** FW: Submission regarding ADMA - Final version



ADMA-Robin-Whittle-1.html (297...

For your attention

-----Original Message-----

From: Robin Whittle [mailto:rw@firstpr.com.au]  
Sent: Friday, 12 September 2003 7:24 PM  
To: adjudication@accc.gov.au; Tania.Mayrhofer@ACCC.GOV.AU  
Subject: Submission regarding ADMA - Final version

Dear Tania and ACCC Adjudication people,

Here is my final submission - spellchecked. Two of the attachments have their URLs listed at the end, and not included here:

- 1 - An explanation of how to comply with the US TSR (Telemarketing Sales Rule):

<http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm>

- 2 - US Federal Trade Commission 16 CFR Part 310 Telemarketing Sales Rule; Final Rule:

<http://www.ftc.gov/os/2003/01/tsrfrn.pdf>

The third attachment is a list of ADMA members, which I have appended to the submission itself.

The attached file "ADMA-Robin-Whittle-1.html" is is easy to view in any web browser.

I will shortly be making this submission available at my site:

<http://www.firstpr.com.au/issues/tm/>

Regards

- Robin

# Submission to the ACCC regarding ADMA's request for authorisation of a modified Code of Practice

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## Background

I am an independent advocate, having been involved in telecommunications privacy since making submissions to, and meeting with, the AUSTEL Privacy Inquiry in 1992. My work involves technical writing in telecommunications. I was a member of the CTN (Consumers Telecommunications Network) council for several years in the mid 1990s. I was one of the advocates who made submissions in 1999 when ADMA originally applied for their Code to be authorised.

My 1999 submissions are at: <http://www.firstpr.com.au/issues/tm/> and the final version of this submission will be available at this URL.

This submission consists of one HTML page and a number of attachments which I intend the ACCC to also print and consider - and which I will supply in printed form to the ACCC in the next few days.

## Summary

This submission focuses primarily on the telemarketing aspect of the current and proposed Code, with secondary focus on ADMA's fitness, and the Code's suitability, for consumer protection in direct mail or other forms of direct marketing.

The problems caused by telemarketing - to consumers and businesses - are not primarily due to marketing and sales as such. The problems are primarily due to repeated, systematic, (typically) large-scale, unauthorised, pernicious and knowingly intrusive use of telecommunications networks, people's telephone services - with all the annoyance and costs this entails. These problems should be solved by government regulation, not by any self regulatory regime such as ADMA was granted, and is seeking to extend.

Even if it were deemed appropriate that telemarketing be subject to a self-regulatory regime, ADMA should not be the organisation which is given government approval for a Code, because firstly it does not have significant "industry coverage" and secondly it is not the key representative body in outbound telemarketing.

Even if telemarketing and other forms of direct marketing were deemed to be suitable for industry self-regulation, ADMA's record of being hostile to privacy, and its apparent desire to have no relationship with the Australian Teleservices Association of makes it an unsuitable body to be given this responsibility.

Numerous failings of the Code are highlighted, but these are illustrative of what is wrong with the whole concept of self-regulation of this kind of exploitative "industry". These are not things which, if fixed, would make the Code acceptable.

The ACCC can only approve codes where there is a shown to be a net positive benefit to consumers (compared to no such approved code) and where that net positive benefit justifies the anti-competitive impact of such an approval. But it is argued here that the code, at least in respect of telemarketing, if approved, conveys an overall *burden* on consumers.

The ACCC is presumably required, either formally or in general pursuit of its consumer protection goals, to only approve a code when it can be shown that the code is as good as it could possibly be. One way of saying this is that the code should be "worlds best practice". Worlds-best practice for telemarketing regulation is not based on a self-regulatory model. This has failed here and in other countries. In the USA, a centralised government-based opt-out system has been implemented, with tremendously high participation rates. Realistic calculations below indicate that the US scheme is at least 400 times more effective at stopping calls per targetted person than ADMA's, irrespective of the general frequency of calls in each country. The US scheme has a 43 times greater participation rate in its opt-out list - and it applies to all telemarketers, whereas ADMA's applies to 10% or less.

While the US scheme falls somewhat short of the ideal regulatory scheme, it is vastly better than any self-regulatory scheme or anything ADMA would willingly accept. Similarly Europe has adopted government regulation, Australia is poised to use legislative measures to govern email on an opt-in basis, and even ADMA has accepted that mobile marketing must only take place on an opt-in basis.

The ACCC should refuse to approve any code of self-regulation regarding telemarketing at all, especially with ADMA. Telemarketing and other systematic intrusive misuse of telecommunications networks should be subject to centralised federal government regulation.

## The Nature of the Telemarketing Problem

ADMA portray the systematic making of millions of unwanted, intrusive, phone calls as an acceptable marketing practice. It is not and never has been acceptable to the vast majority of residential and business telephone customers.

The vast majority of recipients of these calls find them annoying, perplexing, privacy invasive, insulting and/or a burden in other ways. If ADMA or anyone else argues that outbound telemarketing is generally or even to a moderate extent acceptable to consumers, or businesses, then they should propose that it only take place on an opt-in basis.

Outbound telemarketing places a variety of burdens on consumers, on businesses (and therefore on consumers through increased business costs) and on society in general. **Outbound telemarketing has *absolutely no advantage* for the recipient over the wide variety of non-intrusive advertising techniques** (print, radio, TV) or over traditional non-intrusive, respectful, ways of doing business in which the customer initiates contact with the vendor when he or she desires to make a purchase.

Outbound telemarketing is expensive, but getting cheaper due to these developments which will surely lead to a greater burden on consumers and business unless the practice is properly regulated:

1. Decreased costs of placing local telephone calls and calls to mobiles.

2. Decreased costs of making calls from distant places, via various telephone links or via Voice over IP (VoIP - calls carried partly or wholly on the Internet or some other TCP/IP packet-switched network). This enables call centres to be more centralised, including them being located in a remote low-labour-cost country.
3. Decreased costs of long distance and international calls.
4. Decreased costs of using computers to dial numbers, manage calls and keep operators busy. (Such "Predictive Dialling" systems make more calls than operators can answer, and burden the recipient in two ways when this occurs. Firstly they may end the call before it is answered - only to call again later. Secondly, upon answering, the hapless recipient hears a recorded voice instructing them to wait for an operator to be available with an "important message". The use of such predictive diallers should be regulated as a telecommunications matter, it is a question of deliberate widespread misuse of the network and the recipient's telephone service. This is not a privacy or marketing matter at all.)
5. Increased tendency to use pre-recorded or partially automated, and therefore lower cost, methods of making the call.
6. Increased sophistication of computer technology to place calls in ways which get around recipients attempts to defend themselves. In one report (sorry, I don't have the reference now - but I will add it to my site) in the USA, telemarketers have developed automated calling systems which end the call as soon as a live person answers, but persist and leave messages when an answering machine or voice-mail system answers the call.

The prevalence of an unwanted, pernicious, intrusive marketing technique is proportional to its success rate and inversely proportional to its cost. Spam emails have exceptionally low costs and it is not uncommon for a single address to receive 40 a day at present, despite their low success rate which is probably below one in a million at present. All lowering of costs, and all uses of new technology in outbound telemarketing will drive its more widespread use, until proper regulations are enforced.

The burden placed on consumers (and business recipients) has many dimensions. It should not be necessary to list these exhaustively - for several reasons.

Firstly, all ACCC members should be well aware of the problem this causes, unless perhaps they have been shielded in recent years by unlisted numbers at home. Also, I expect that telemarketers don't target the ACCC as much as they target businesses and other organisations, who are plagued with calls and trickery to try to bypass the defensive measures put in place to stop these calls wasting the time of decision-makers.

Secondly, outbound telemarketing has *no* benefits for recipients over a variety of well accepted non-intrusive marketing/sales techniques. So even if the burden it placed on consumers, business and society in general was small, the conclusion would be the same - it must be regulated to prevent these costs being borne, except by those very few companies or individuals who for some reason explicitly consent to receiving such calls on an opt-in basis.

Nonetheless, here is a summary of some of the burdens outbound telemarketing places on society. Other forms of intrusive systematically made unwanted telephone calls create similar burdens - market research calls and malicious calls (harassing, threatening or offensive, as per Section 85ZE of the Commonwealth Crimes Act).

Some proponents of outbound telemarketing draw a distinction between "charity" calls and sales calls - but this usually of no importance to the persons who must be protected (consumers

and businesses) because they simply do not want any such sales (or often survey) calls *at all* irrespective of whether they are thought to be commercial or charity by the caller.

Some burdens imposed by outbound telemarketing include:

1. Disruptions, wasted time, frustration and annoyance at home and at work, on a massive scale nationally, at almost any time of the day or evening - with little or no chance of using personal defences to avoid such calls.
2. Tying up a person's telephone line with an unwanted call.
3. Interrupting an existing call (via call waiting) for the unwanted telemarketing call.
4. The necessity (for most people who prefer to be pleasant) of trying to get rid of an unwanted caller who is trained and experienced at avoiding all such attempts to end the call. Thus the recipient is thrown into a contorted, deceptive, psychological situation where they are trying to get a trained, paid, professional manipulator to end the call, without being unpleasant and without violating standards of decency the recipient would prefer to uphold. Callers often use every possible means to twist the recipient's mind into listening to their spiel, especially be deliberately misconstruing or ignoring the recipient's polite rejections. The result is that the best way, as most people discover, to get rid of telemarketers is to be abrupt and unpleasant (such as hanging up without a word, or with few words) or to be actively unpleasant in the hope of contributing to job stress, costs for employers and so, in a lasting sense, to an overall reduction of the incidence of outbound telemarketing.
5. The common experience by many people - whoever answers the phone - of being talked to in a supposedly pleasant and supposedly polite manner, for purposes of manipulating them into doing something they do not want to do. Callers often insist they are not selling anything, and that they are making a "courtesy call" - but this is deliberately deceptive and gives the recipient little alternative but to either end the call abruptly, or engage in an argument about the nature of the call, which the caller is trained to exploit as a means of delivering their marketing message.
6. The constant, unpredictable, privacy invasions at home, or on mobiles, by which recipients stop what they are doing, answer the phone expecting a friend or a customer, and find themselves wasting their time talking to, and trying to get rid of, a person who cares nothing for them and only wants to get their attention and money, despite all the caller's pretences to politeness, "courtesy" etc.
7. The pressure of unwanted calls, often resulting from aggressive repurposing of the contents of the White Pages (which Telstra has consistently opposed in the courts), causes many people (but usually not businesses, who must be in the directory to do business) to pay substantial fees each year for an unlisted number (known in Australia by the anachronistic term of "silent line" and overseas as "ex-directory" or "unlisted" numbers). This is an economic burden for millions of Australians, amounting to costs in the dozens of millions of dollars per year. This is a small indication of how much people value their peace and quiet - that they would go to the trouble and the recurring expense to get their name and number out of the directory. There are further costs to the people themselves, to their friends and to society in general from this trend towards having an unlisted number. It causes friends from the past to be unable to find each other as people move and change their addresses. It causes extra costs to phone company enquiry lines - which is the supposed justification for charging \$32 or so (I haven't researched the actual fee recently). It greatly inhibits the ability of individuals, helping professionals and officials to contact people in times of accident or

emergencies. I have not researched current figures for ex-directory numbers in Australia or the USA, but I recall in the mid 1990s it was well above 50% in California. The pressure for going ex-directory is almost entirely due to the problems of outbound telemarketing calls - but some proportion of the population would want to be ex-directory for other privacy reasons as well.

The ACCC should ask Telstra the annual cost of the "silent line" service and how many customers currently pay for this. Multiplying the two together gives a dollar cost to the community which is very largely due to the burden of telemarketing on the community, and which represents only a fraction of the many concrete and diffuse costs and other burdens the public has to pay for this pernicious business practice.

8. In the USA, where many people at home are subject to two or three telemarketing calls a night, for years after year, this *must* contribute significantly to the level of angst, and generalised levels of distrust of strangers. (It would also exacerbate the suffering of people with depression, mood disorders and the like.) This, along with the prevalence of guns and violence, is a significant contributor to the generalised lower levels of trust for strangers in the USA compared to Australia. Every outbound telemarketing call in Australia degrades our collective ability and propensity to trust and be happy. So outbound telemarketing, especially as it rises towards the extreme levels it has in the USA, is a powerful cause of the irrevocable destruction of one thing which Australia is rightly well-known for - our generalised trust for strangers, otherwise known as our happy "national character". It is a travesty that a pernicious marketing technique should be allowed to invade the lives of most citizens and systematically destroy our trust in fellow Australians who we don't know, forcing us to be more defensive about answering the phone, and damaging our "national character". The destruction or diminution of this "national character" has important economic impacts in tourism and more broadly in our ability to export food and other goods and services where the subjective judgement as to the product's quality and value is partly dependent on the nature of the people and society which produce it. It follows that any country which successfully protects its citizens (at home and at work) from the time-wasting and character-embittering effects of outbound telemarketing will enjoy greater domestic happiness, lower levels of stress-induced illness, greater productivity and will be internationally recognised, explicitly and by flow-on effects, as a country where respect, quality and decency are thriving.
9. Market research via telephone is not always of any social value (such as merely testing the impact of an advertising campaign) - but it can be of immense social value (for governments, community organisations and social researchers), and the alternative forms or contact are either much more expensive (face-to-face interviews) or have such a low response rate (surveys by mail or the Web) that their results are of little or no quantitative value. Some or many people are prepared to respond positively to market research calls, assuming that these are genuine calls for matters of interest to the person, and that they are conducted according to internationally recognised standards as has long been developed by the market research industry. Market research telephone calls are a unique, cost-effective and timely approach to market research - but their effectiveness is greatly diminished by the pressure of telemarketing. This has long been recognised in the market research industry (I have some references, but it is self-evident), to the point where this, the most widely used form of market research, is becoming increasingly useless due to low response rates. The cause is firstly the high incidence of ordinary telemarketing calls, leaving people with no interest at all in why they are being called - just an urgent desire to end the call and ensure they are never called again. The second cause is the subset of outbound telemarketers who are "SUGgers" - Selling Under the Guise of market research. SUGging is a trades-practice and marketing regulation issue, embodied within an unwanted intrusive telecommunications issue. Theoretically SUGging might be effectively eradicated by

some regulatory means - though almost certainly not a self-regulatory one, since the callers who use these deceptive techniques would not want to join any such self-regulatory industry body. As long as telemarketing is not properly regulated as a telecommunications problem, SUGing will continue. Any level of telemarketing, and SUGing in particular, seriously burdens the market research industry, as well as the recipients of these calls. Telephone market research is a vital and irreplaceable avenue for a wide range of socially valuable research. The only way of saving the value of telephone market research is to properly regulate telemarketing - with centralised government regulations.

There are some specific problems with telemarketing from a consumer protection perspective which do not relate to its central problem of being an intrusive misuse of the recipient's phone service.

## Telemarketing-specific consumer protection issues

Direct marketing sales involve a number of systemic problems for recipients/customers. These include the way customers are prompted into making decisions about purchases when they least expect it, with the possibility that they will therefore make a decision they later regret. ADMA's code and other state regulations try to deal with these problems with cooling off periods etc.

But there is another systemic problem with outbound telemarketing which is not at all subject to regulation - the fact that any level of officially sanctioned telemarketing is an encouragement to people in general to divulge personal information to anyone who calls them. **One would think that far from allowing outbound telemarketing as if it was a reasonable business practice, that there should be a complete ban on this approach to selling or soliciting donations and/or a public awareness program to warn all business people and consumers *never* to divulge information to people who contact them by phone.**

The following discussion uses the example of the person's credit card details, but applies in general to absolutely anything they divulge about themselves in the course of responding to a call which to them, appears to be an outbound telemarketing call.

In an ideal world, outbound telemarketing would be banned outright, with the possible exception of an infinitesimally small number of people who opted in, after they had been warned of all the risks, of whom it could be shown were not certifiably insane, and who had made a fully informed explicit decision.

As long as outbound telemarketing remains an officially or socially "accepted practice" (even though the vast majority of people do not respond positively) then there is a generalised situation in which some, or many, people have the following expectations:

1. It is common, and officially accepted, that legitimate businesses, charities (and so-called charities, such as businesses licensing charity's names for a tiny percentage of the proceeds of the sales/"donations") will call businesses and homes, requesting information about recipient's living situation, desires, plans etc. and making sales, or taking donations, typically involving the recipient giving their full credit card details.
2. That recipients of such calls should take on face value what they are told by the caller.

3. That since this is an officially sanctioned or tolerated business practice (as it currently is due to lack of regulation and due to the ACCC's approval of ADMA's Code) that there is some form of safety in this sort of communication, and that there are ways by which the recipient will be generally protected by the law (or perhaps some self-regulatory scheme) in the event that the caller misuses the information divulged to them.

In the current situation, where these things are generally accepted by some or many people, then some of them will naturally divulge personal details to whoever calls them and convinces them of their bona-fides. Its easy to imagine this being used for criminal purposes, and for stretching or breaching standards of good business practice. No degree of self-regulation can prevent this. Furthermore, even firm government regulation of telemarketing - any situation in which outbound telemarketing is accepted by the government as a legitimate practice - will foster the above beliefs in the minds of millions of consumers, without being able to prevent criminals from duping consumers.

In the above environment, criminals can easily convince many people that the caller is a company or "charity" the recipient may or may not have heard of. Also, the criminal could be outside Australia, and so not in the slightest subject to Australian laws, or probably any (currently lacking) ability of the telecommunications carrier to retrospectively trace the origin of the call. Here are some scenarios which demonstrate that **any public acceptance of outbound telemarketing as a legitimate business practice will inevitably lead to criminals taking great advantage of consumers.**

- Caller convinces recipient that they are a legitimate business or charity - and solicits a sale or "donation" to be paid for by credit card. Caller then has the recipient's full card details - their name, card number, expiry date and security number. This enables the caller to make a potentially very large series of purchases with the recipient's card. These would typically be via the Net. Purchases of goods and services might be revealed in the weeks or months which follow to be fraudulent, but by then, the goods or services (such as saleable items and Internet access, telephone calling cards in any country, or perhaps online gambling etc.) will have been delivered. A more direct method by which credit card details can be used to generate cash is via the huge number of adult Internet sites which involve monthly subscriptions (by credit card) with incentive payments to referring web sites. Thus, the caller establishes some such site, and registers it as a referring site with a large number of adult sites. The caller then collects a substantial number of sets of credit card details, and using appropriate software to automate the process, causes multiple "customers" to subscribe to multiple adult sites, with the incentive payments being made to their own site before the fraud is exposed. The cost to the banks and consumers is massive, since hours or days are required in each instance to untangle and try to reverse the unauthorised transactions, and to establish a card with a new number.
- Caller asks about the recipient's security system and/or their valuable possessions, and thereby gains information for a future burglary.
- Similarly, asking questions about holidays, work times or other aspects of the person's life, under the guise of selling travel packages, provides information which will assist in a burglary or other fraudulent activity.

Other branches of the ACCC would be well aware of the many ways in which people can be duped via telephone. The point is that **these criminal abuses only possible on a large scale in an environment when there is a generalised expectation that outbound telemarketing is a legitimate business practice.**



There is no way of successfully regulating to prevent these abuses. The only way to reduce or eliminate them is to either ban outbound telemarketing (except perhaps for a tiny number of well-informed people who opt-in to it), or to allow it to continue, with a public awareness campaign which urges people never to divulge any personal information to anyone who calls them - but to do so only after calling a number which the caller may point them to, but which can be known for sure, (such as via the White Pages) as belonging to a legitimate organisation which is known to and regulated by the appropriate government regulatory agency. This is fine in principle - and somewhat inconvenient in practice. But it would be anathema to telemarketers is because the sole reason they persist with outbound telemarketing is because of its surprise effect, its manipulative power over some people - its ability to cajole some people into paying money without much further thought. A lot of that manipulative power would be destroyed if all recipients were required to end the call and call some number, after verifying that it was to a legitimate organisation. This would give them time to reflect upon what they had just been talked into, and time to get back to whatever they were interrupted from doing - so ending the attention-focussing manipulative spell of the telemarketer before the sale or donation has been finalised.

The elimination of outbound telemarketing as an accepted business practice is the only way to prevent a large number of potential and actual criminal and fraudulent misuses of consumers' private information, especially their credit cards.

**Far from being regulated and approved by the ACCC, outbound telemarketing should be banned or tolerated only once the public is fully informed of the dangers it involves.**

## Charities and outbound telemarketing

A small number of legitimate charities use outbound telemarketing directly to raise funds. There are a number of reasons why this should be discouraged. Firstly, as noted above, it conditions people into giving their credit card details to people they do not know, and have no way of identifying, since telephone calls have no way, at the time, of being traced and shown to originate from a legitimate organisation.

Secondly, the charity use of outbound telemarketing involves several pernicious costs which are contrary to the needs and expectations of the public, and of charities in general. These costs and problems include:

1. The cost of unwanted intrusive phone calls which is forced upon the public in general (unless the charity only calls those who have previously given their informed consent). It makes no difference how needy or worthy a charity is - this can be no justification for burdening individuals or businesses, or hundreds of thousands of individuals or businesses, as listed above in the discussion of the general problems of telemarketing.
2. The high costs, in phone calls, call-centre capital and running costs and labour costs, of making the vast numbers of outbound calls. This inevitably *greatly* diminishes the proportion of funds collected which remain after costs for the intended purpose of funding the charity's core activities. (There is a fair-trading problem here in that potential donors are not told what proportion of their payment actually goes to the charity - and also that there seems to be no compulsion for them to be told the caller is a business licensing the name of the charity, rather than the charity themselves. These problems would be insignificant if calls were made only to the small number of people who would knowingly opt-in to them. )

3. The resulting fatigue of potential donors caused by repeated calls from a specific charity, or charities in general. This transforms the charity from an organisation which should be, and wants to, contribute to society into a privacy invasive, manipulative time-waster which has to try to make a profit in a low-efficiency, high-cost relationship with the public and its donor base.

There are further costs and problems inherent in the common practice of a legitimate charity (or even an organisation such as a public radio station, which is not a charity, but may be perceived as one by the public) licensing its name to a commercial outbound telemarketer, which solicits donations, sells "gifts" or sells "discount cards" (for \$90 or so) on behalf of the charity. Very often, the caller pretends to be from the charity itself, and the recipient has no way of knowing that only a small proportion of the gift sale, or "donation", goes to the charity. As I wrote in 1999 <http://www.firstpr.com.au/issues/tm/comments-rw-1.html> :

I recently (1995) talked to a telemarketing company which licensed the name of a teenage cancer charity (CanTeen) and sold a pen and letter opener set for a \$39.95 "donation" - with an invoice from the charity. There was no mention in the call or the paperwork that any other organisation than the charity was involved, and yet the telemarketing supervisor confirmed (without apparent shame) that only \$2 of that \$39.95 goes to the charity.

The general donor fatigue caused by legitimate charities telemarketing the public, plus the knowledge that charities (at least some of them) care so little about the public that they will spend hundreds of thousands of dollars making such calls, is greatly compounded by the commercial licensees of charity names - who further wear out the public and give them less and less confidence that a substantial proportion of their "donation" ever goes to the charitable cause.

Some of the issues here are more properly covered by trades-practice and charity-specific regulations, since they are not specific to direct marketing. However direct-marketing techniques of telemarketing, door-to-door sales and direct mail (as well as potentially email or SMS etc.) significantly exacerbate the problem, firstly by the charities and pseudo-charities (the commercial licensees) spending so much money invading peoples privacy, and secondly because these direct-marketing arrangements provide people with greatly diminished opportunities to think carefully about their "donation" or to check the bona-fides of whoever they are being urged to give their money to.

As with sales, "charity" telemarketing has *no* benefits for recipients over other non-intrusive methods of making donations.

These problems can and should be solved by centralised government regulation in the domains of telecommunications, charity and direct marketing. A self-regulatory scheme such as ADMA's has no real impact, because any charity or commercial licensee who would be restricted by ADMA's Code would be better off not joining ADMA.

## Regulating telemarketing

While outbound telemarketing does have some unique problems in the event that a sale or "donation" takes place, the real problem is that it happens at all (unless to the minuscule number of people who would make an informed and unpressured choice to opt-in to such

calls).

Outbound telemarketing is primarily a telecommunications issue. It is the systematic misuse of people's telephone services, in circumstances where potentially millions of people are called - in all but a few cases, contrary to the desire of those recipients.

As such, neither the ACCC nor ADMA should have any role in regulating this particular aspect of the unwanted call problem. It is a telecommunications problem and it should be regulated appropriately by the federal government. Ideally this should be as part of a generalised prohibition of systematic abuses of the telephone network and individual and business telephone services, extending the currently narrow criminal provisions (85ZE: harassing, threatening or, in all the circumstances, offensive).

This regulation should be generalised in principle and apply as evenly as possible to email, phone calls, instant messenger, ICQ etc. as well as to SMS and other point-to-point technologies which are yet to be developed.

The problem with the current arrangement of an ACCC approved Code for ADMA as the government sanctioned regulator of the "telemarketing industry" is that it provides zero or negative benefits of the public (both consumers and business) whilst giving the impression that:

1. Outbound telemarketing is properly regulated.
2. That it is a legitimate practice for businesses and charities.

I believe the ACCC should refuse to approve any Code proposed by ADMA (or any other body) which concerns telemarketing. The reasons above are more than sufficient to show why telemarketing should not be subject to any legitimising weak self-regulatory regime, and why it should be subject to centralised, hard, telecommunications-specific government regulation. Even if the ACCC rejects all the above, additional considerations detailed below show why ADMA should not be entrusted with the regulation of telemarketing, and perhaps any matter concerning consumers' privacy at all.

## Worlds best practice in email and mobile marketing regulation

In June 2003, the Australian Government has promised to regulate unsolicited commercial email on an **opt-in** basis, via **legislation**, except where the recipient was in an existing business relationship with the sender:

[http://www.noie.gov.au/publications/media\\_releases/2003/Jul/spam.htm](http://www.noie.gov.au/publications/media_releases/2003/Jul/spam.htm)

This follows an NOIE report into the spam problem, in April 2003. This includes details of the European Union, Austrian and Danish **opt-in legislation**.

[http://www.noie.gov.au/publications/NOIE/spam/final\\_report/](http://www.noie.gov.au/publications/NOIE/spam/final_report/)

The Danish **legislation** of 2000 (as amended to 2003), provides **opt-in** arrangements (or an existing business arrangement) for email, fax and "automatically dialled" phone calls (section 3). There is also a **government-operated opt-out list**, with no mention of charges to access that list:

<http://www.fs.dk/uk/acts/ukmfl.htm>

(There may be some definitional problems in whether "automatic dialling" refers to any non-manual dialling system, as is used by moderate and large-scale telemarketers - which it probably does - and whether the following "automated calling machines" only refers to systems with no human involvement.)

The European Union **legislated** in 2002 for **opt-in** regulation of email and other forms of communication.

DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_201/l\\_20120020731en00370047.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf)

(40) Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of **automated calling machines, telefaxes, and e-mails, including SMS messages**. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that **prior explicit consent** of the recipients is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users.

<http://www.euro.cauce.org/en/bground.html>

<http://www.euro.cauce.org/en/timeline1.html>

The European Coalition Against Unsolicited Commercial Email has an extensive listing of regulations regarding email and sometimes other forms of unsolicited communications. A number of countries are listed as having **opt-in** legislation.

<http://www.euro.cauce.org/en/countries/>

The state of California regulated unsolicited commercial email, telephone, mobile and fax communications. This legislated opt-in approach is contained in three bills which can be found via the search page: <http://www.leginfo.ca.gov/bilinfo.html> by selecting the 2001-2002 session and three bill numbers listed below. Also listed is a brief description and the URL of the final Act:

#### **SB 1560**

[http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_1551-1600/sb\\_1560\\_bill\\_20020919\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1551-1600/sb_1560_bill_20020919_chaptered.pdf)

Attorney General's department to maintain do-not-call list and distribute it with appropriate conditions, in the form of numbers and zip codes only. (As noted

below this list of 1,550,644 numbers has been added to the new US national do-not-call list.) The list is made available with a sliding scale of fees depending on size or telemarketing company.

#### **AB 1769**

[http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_1751-1800/ab\\_1769\\_bill\\_20020919\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1769_bill_20020919_chaptered.pdf)

Legislated opt-in for SMS spam and other marketing messages to mobile devices.

"This bill would, subject to certain exceptions, generally prohibit a person or entity conducting business in this state from transmitting or causing to be transmitted a text message advertisement to a cellular telephone or pager equipped with short message or a similar capability. By creating a new crime, the bill would impose a state-mandated local program."

The main exceptions seem to be charities and political parties, since it relates only to promotion of "sales". Messages to recipients who already have a business relationship with the sender are exempted

#### **AB 2944**

[http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_2901-2950/ab\\_2944\\_bill\\_20020919\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_2901-2950/ab_2944_bill_20020919_chaptered.pdf)

Bans unsolicited commercial emails unless there is a valid email address or toll-free number with which to opt-out - in the first text section of the message. "ADV:" and "ADV:ADLT" to be at the start of the subject line. Employers can opt-out for all email addresses in their organisation. Act to become inoperative when federal legislation to prohibit or otherwise regulate unsolicited commercial email (UCE) is enacted.

## **Worlds best practice in telemarketing regulation**

I have not had time to research in detail the latest telemarketing regulation regimes in European countries. While worlds best practice is not necessarily defined by the new arrangements in the USA, these arrangements, described in the next section, should be examined closely by the ACCC in assessing ADMA's application.

I have written in the past on how some phone companies in the USA implement "Customer Activated Malicious Call Trace" - the ability, for a small fee, to have any incoming call traced after it has ended, with the number being available only to the Police and/or phone company or telecommunications authority inspectors. This material has not been updated in recent years, but as far as I am aware, no progress at all has been made towards this in Australia since I wrote it:

<http://members.ozemail.com.au/~firstpr/mct/>

For a variety of reasons well beyond proper regulation of telemarketing, it is vital that this be made a standard feature of all Australian telephone services - fixed and mobile. Without this,

hoax calls, including potentially hugely costly and disruptive bomb threats, can be made with impunity.

There is no jurisdiction I am aware of which has a really solid regulatory arrangement for all forms of systematically made unwanted calls, and for other such abuses of the phone networks and Internet, and the services which are connected to them.

However there has been a major step in the right direction in the USA, at least for telemarketing, which accounts for the vast majority of the invasive unwanted call problem.

Self-regulation and state-wide opt-out lists were found to be insufficient to deal with the burden imposed on the public by outbound telemarketers. The USA suffers a higher incidence of calls than we do in Australia, due in part to the fact that local calls are free. But as telecommunications costs and technologies change, there is no reason for complacency in Australia - there is every reason why the telemarketing pressure will increase to the levels of several calls a day that it has in the USA.

The primary reason citizens create, support and pay for governments is to create a centralised system for protecting some or all citizens from things they cannot protect themselves from individually.

An in-principle and case-by-case study of this - and those aspects of life in which the government should not be involved - is in my 1998 submission to the Senate Select Committee on Information Technologies: Inquiry into Self-Regulation and the Information and Communications Industry:

[http://www.firstpr.com.au/issues/senate-it/scit\\_rw2.html](http://www.firstpr.com.au/issues/senate-it/scit_rw2.html)

An adult citizen can individually protect himself or herself quite adequately, and much better than a government could, from various threats and inconveniences, such as the problem of seeing or hearing things which they find distasteful or disturbing in the books, magazines, newspapers, radio, television and Web-sites they read, listen to or view. (But governments bent on social control sometimes pretend otherwise.) Citizens individually, or as small communities, cannot protect themselves against a number of more diffuse and serious invasive threats, including burglary and assault by local criminals, from attacks by terrorists, and from the entire country being invaded by foreign forces. These are *primary* reasons why people expect, demand and depend on government protection. Likewise, citizens expect governments to systematically work to control threats of disease, flood, fire etc. which they cannot individually defend themselves against. Outbound telemarketing and other systematic kinds of unwanted telephone calls are threats and inconveniences which people have no way of protecting themselves from, due to the very limited capabilities of their phone, and the very limited nature of its connection to the telephone network. (The situation is quite different in the case of the Internet, where the customer equipment is a computer, which can run software which communicates with any other computer on the Net - so it is possible, if tricky, to build very good personal defences against spam. However, spam still should, in my view, be subject to some government regulation, since it is a systematic abuse of the network and of people's Internet services.)

Since the 1980s or so, there has been a fashion in administration and politics for governments getting out of regulating industries and protecting citizens. The current overall policy in Australia which gives rise to these ACCC-approved Codes is part of that trend. In some cases, where the industry body and the industry participants are of good character and have a genuine desire to respect the needs and desires of the public, a self-regulatory approach is good or ideal. But this is *not* the case with the intrusive communications of spammers or outbound

telemarketers.

The experiment of self-regulation in outbound telemarketing has failed, here and overseas (as far as I am aware). Certainly in the USA, it has failed. It takes a lot to get a government, especially the Bush administration, to *increase* or *instigate* government regulation of business to protect consumers. But this is what has happened, because the long experiment with weaker forms of telemarketing regulation has *failed*.

We advocates consistently argued against self-regulation for telemarketing in 1999 and many of us argued against ADMA having any self-regulatory role, based on our past experience - and our experience at the time - with this organisation, which has consistently tried to minimise privacy protection for Australians.

So the ACCC should look closely at the US development, where these self- and state-based regulatory experiments have been tried, because they failed there for the same reason they fail here: Outbound telemarketing is *inherently* a privacy invasive business practice. Proper regulation involves ending this business practice entirely, except for whatever small number of individuals would knowingly opt-in to receiving such calls. Therefore, asking an industry to self regulate itself is like asking a burglar to never burgle again. It is entirely unrealistic to think that ADMA, or any group which is genuinely representative of telemarketers (which ADMA is not), could ever regulate telemarketing properly, because to do so would virtually eliminate the practice by which they earn their living.

The new arrangements in the USA are far from ideal, because of the various types of call, such as from political parties, which escape regulation. But this is an important and long-overdue step in the right direction, because it is centralised government regulation, with *real* harsh penalties, imposed by the government, on a national basis.

The ACCC should refuse to authorise ADMA as a regulator of telemarketing and so enable this problem to be regulated properly, following the lead of the USA, the EU and some European countries.

## The US National Do Not Call Registry

This is operated by the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) and will be enforced by these two agencies, and state law enforcement officials. This national, strongly enforced, opt-out system is the product of many years deliberation. The key pages for regulatory decisions and rules are:

**<http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/>**

**<http://www.fcc.gov/cgb/policy/telemarketing.html>**

This greatly extends the FCC's relatively weak regime established in 1992, and shows that the US public and government have no faith at all in direct marketer's desire to self-regulate outbound telemarketing.

The sites for consumers and telemarketers are:

**<http://www.donotcall.gov>**

**<https://telemarketing.donotcall.gov/>**

The FAQ <http://www.donotcall.gov/FAQ/FAQConsumers.aspx> says:

The registry was created to offer consumers a choice regarding telemarketing calls. The FTC's decision to create the National Do Not Call Registry was the culmination of a comprehensive, three year review of the Telemarketing Sales Rule, as well as the Commission's extensive experience enforcing the Rule over seven years. The FTC held numerous workshops, meetings and briefings to solicit feedback from interested parties and considered over 64,000 public comments, most of which favored creating the registry.

Scaling to Australia's population, this would be about 5,000 submissions.

This current ACCC consideration of ADMA's Code has received no publicity, and will primarily draw submissions from a handful of advocates and consumer organisations. But the ACCC might like to consider that in principle, if not yet in intensity, the US situation is identical to the Australian one, and that with proper consultation with the public, 5,000 or so submissions would be received, the vast majority opposing self regulation and calling for an urgent government regulatory response at least as robust as that adopted in the USA.

Rather than entrust the opt-out list to a "self-regulatory body" (the US DMA has long had such an opt-out list), the regulations establish a body under government auspices to operate the list. This means that consumers can have far greater confidence in their information being handled properly. (See below for the problems inherent in ADMA's approach.) Most of the 27 state-based do-not-call lists have been or will be transferred to the federal system.

Enforcement is *hard* rather than the weak or non-existent sanctions of a self-regulatory regime. Telemarketers who break the new rules can be fined USD\$11,000 for each call.

The FTC, in a press-release: <http://www.ftc.gov/opa/2003/09/030902dnc2.htm> stated:

**For Release: September 2, 2003**

**DO NOT CALL Registry Jumps To 48.4 Million**

***Six Million Consumers Register During Labor Day Weekend***

In the 72 hours before the Do Not Call Registry became available to telemarketers, more than six million consumers added their telephone numbers to the list. In contrast to earlier DNC registrations that were completed primarily through Internet registration (80%), the Labor Day weekend registrations were more evenly divided with about fifty percent Internet registrations and fifty percent telephone registrations.

A table of state-by-state details, as at 25 August:



<http://www.ftc.gov/opa/2003/08/030825drs.htm> shows 41,717,790 registered numbers, of which 14 state lists contributed 9,033,751 and the remainder being the result of individuals registering by:

- Phone: 6,981,298.
- TTY (for the sight/hearing impaired): 237.
- Web: 25,702, 504.

With six million numbers being added in the week before the cutoff date for commencement of the regulations on 1 October, it can be seen that there is a tremendously positive public response, with the likelihood of tens of millions of numbers still to be added. (ADMA's response to its opt-out list is shown below to be about 1/43 as successful after two years as the initial phase of the US system.)

Predictably, the telemarketing representative organisations are unhappy about genuine government protection of consumers. A 2 September report at <http://www.adage.com/news.cms?newsId=38620> reports two lawsuits against the government Commissions:

### **30,000 an hour**

During the first 66 days, consumers registered to block telemarketing calls at an average rate of 733,333 phone numbers a day -- or more than 30,000 an hour. Those numbers do not include an additional 9 million phone numbers transferred into the federal list from existing state do-not-call lists.

Because the Registry keeps track only of phone numbers and not households, it is not known exactly how many individual households have taken advantage of the new anti-telemarketing system. There are approximately 105 million U.S. households.

Both the FTC and the American Teleservices Association declined to estimate the number of individual households involved with the 48.4 million phone numbers registered to date.

The teleservices association, which represents companies that sell by telephone, and the Direct Marketing Association have filed lawsuits challenging the FTC and Federal Communications Commission rules that established do-not-call lists. A judge has scheduled a hearing on the ATA's lawsuit for Sept. 12.

At the highly regarded <http://www.junkbusters.com> site of ex-patriate Australian, Jason Catlett, reports on how the two Commissions worked together and reduced the number of exceptions to the new system <http://www.junkbusters.com/new.html> (2003-9-9):

(26 June) The FCC's co-ordination is significant because the FTC does not have statutory authority over two of the largest industries that use telemarketing, telecommunications and financial services. Junkbusters President Jason Catlett commented:

With the FCC's cooperation, the Do-Not-Call registry will have the breadth and clout to eliminate most of the nation's

junk calls. Aluminum siding installers may be weeping, but the 99%+ of Americans who are not employed to pester people by long distance calls can rejoice. The registry is surely one of the most significant consumer protection measures ever implemented by the federal government.

It will save the equivalent of thousands of lifetimes wasted picking up the phone on unwanted calls. The FCC was late for the party that they should have thrown a decade ago, but they have now said, a weekend in advance, that they'll come to the ball with the FTC. American consumers who hear about it will be in such a rush to register that they may not think to ask why their interests were disregarded the FCC for so long. FTC Chairman Muris will go down in the history of consumer protection as the savior of the American dinnertime.

The FCC commissioners' vote was unanimous, some of them called the plan the "best thing" the FCC has ever done. Junkbusters President Jason Catlett commented that it was indeed the best thing the FCC has ever gone along with.

The main recent political battle had been in the House. [Washington Post] (2/13, p. E7) The Wall Street Journal recounted the heroic efforts of FTC chairman Muris to save the project from the underhanded lobbying of the Direct Marketing Association. (4/4)

The National Do Not Call Registry only publishes numbers - it does *not* link those numbers to any other information. In contrast, the ADMA list involves distributing each person's full name, address and telephone number to all companies (ADMA members and non-members) who pay for it, which has completely intolerable privacy implications for many or most people.

The National Do Not Call Registry makes lists of numbers available, by area code or for the entire country (depending on the subscription arrangement) so that telemarketers can remove these numbers from their lists. As described at <http://www.ftc.gov/opa/2003/08/tmkraccessinfo.htm> these are text or XML (a highly structured form of text) as compressed zip files, via FTP over the Net. Update files are also produced, so that it is not necessary to regularly download the entire file to stay up-to-date.

There is also a web-based interactive approach to checking numbers which involves no lists or data-processing - up to 10 numbers at a time, in one area code, can be checked via an ordinary Web browser session.

More information for telemarketers can be found at:  
<https://telemarketing.donotcall.gov/FAQ/FAQBusiness.aspx> ..

According to <http://www.ftc.gov/bcp/online/pubs/alerts/dncbizalrt.htm>

Data for up to five area codes will be available for free. Beyond that, there is an annual fee of \$25 per area code of data, with a maximum annual fee of \$7,375 for the entire U.S. database.

An explanation of how to comply with the **TSR (Telemarketing Sales Rule)** is at: <http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm> .. In contrast with fashions still prevailing in Australia, this 38 page document constitutes detailed and prescriptive government regulation of business, in order to protect consumers in a field where they cannot individually or collectively protect themselves. This US Federal Trade Commission document is an attachment to this submission and I ask that the ACCC scrutinize it and compare it to ADMA's proposal. I don't have time to exhaustively compare the two, but it is clear that ADMA's proposal falls well short of Worlds Best Practice, in principle (self-regulatory vs. government regulation) and in many specific details.

These rules concern the sales and information privacy aspects of telemarketing calls, including inbound calls - where other marketing material encourages a potential customer to call a number in order to purchase goods or services. So this goes well beyond the question of unwanted calls, and into the consumer protection aspects of direct marketing.

The rules, in general, do not apply to charities or political organisations. The exemptions are summarised at a site with a name similar to, but with a .com, rather than .gov, to the Do Not Call site: <http://www.donotcall.com/loopholes.asp> :

### The Loopholes

- Political calls are exempt under both FTC and FCC rules - These are always the first to be exempt since politicians make the rules.
- Charity calls are exempt under both FTC and FCC rules.
- Telephone Survey Calls are exempt under both FTC and FCC rules - Many telemarketers will try to claim they are taking surveys when they are actually selling something.
- "Existing Business Relationship" calls are exempt under both FTC and FCC rules - This is the tricky one. You see if you buy a piece of gum at a chain store you suddenly could have an "Existing Business Relationship" with 27 affiliated entities trying to sell you everything under the sun. Marketers are now adding clauses to surveys, contest entries, and other contracts and agreements that allows them to add you to telemarketing lists even if you registered with the National Do Not Call Registry.

### Exempt under FTC rules but included under FCC rules:

- Long-distance phone companies are exempt under FTC rules but FCC rules will not exempt these calls.
- Airlines are exempt under FTC rules but FCC rules will not exempt these calls.
- Banks and credit unions are exempt under FTC rules but FCC rules will not exempt these calls.
- The business of insurance, to the extent that it is regulated by state law are exempt under FTC rules but

FCC rules will not exempt these calls.

FCC is trying to add exemption for Radio and TV station calls. They claims calls telling people to watch or tune in are somehow not an advertisement!

The rules do not generally apply to calls directed at businesses, but there are specific, and quite important instances in which the rules *do* protect businesses from the constant pressure of sales calls regarding fax rolls, cleaning supplies etc. From the explanation of the Telemarketing Sales Rule <http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm> :

**Business-to-Business Calls, Unless They Involve the Sale of Nondurable Office or Cleaning Supplies**

Most phone calls between a telemarketer and a business are exempt from the Rule. But business-to-business calls to induce the retail sale of nondurable office or cleaning supplies are covered. Examples of nondurable office or cleaning supplies include paper, pencils, solvents, copying machine toner, and ink – in short, anything that, when used, is depleted, and must be replaced. Such goods as software, computer disks, copiers, computers, mops, and buckets are considered durable because they can be used again.

The abovementioned document is the short, informal, version. The formal document is a 101 page PDF:

**Federal Trade Commission 16 CFR Part 310  
Telemarketing Sales Rule; Final Rule  
<http://www.ftc.gov/os/2003/01/tsrfrn.pdf>**

This Final Rule document is also an attachment to this submission. I ask the ACCC to cast their eye over it, since it contains reasoning behind the Federal Trade Commission's decision, and is indicative of the importance and complexity of proper regulation of outbound telemarketing.

The final decision on fees for telemarketer access to the list contains some estimates of the numbers of telemarketers in the USA:

<http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/tsrfrn030403.pdf>

### **Strengths and limitations of the US approach**

Ideally, outbound telemarketing would be banned, except to those those who give explicit, informed and unpressured consent.

Failing that, an opt-out system seems to be the best solution - but since the majority of people,