



**Australian
Privacy
Foundation**

Do Not Knock Register Bill 2012

Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs

August 2012

e mail: mail@privacy.org.au

website: www.privacy.org.au

Please note that APF does not have a single postal address – we prefer communication by e-mail. If a postal address is required please contact the signatory.

Publication of submissions

We note that we have no objection to the publication of this submission in full. To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably only a limited part of, a submission.

The Australian Privacy Foundation (APF)

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. For information about the Foundation see www.privacy.org.au

Introduction

We strongly support a right for individuals to control what many perceive as the nuisance of door-to-door sales and solicitations, and welcome the initiative of this Bill, which deserves support.

Rather than rehearse all of the arguments for effective regulation of door to door marketing, we endorse the excellent submission which has been made by the Consumer Action Law Centre, which includes the evidence of the take up of the Do Not Knock sticker in support of the case.

We would like however to add to their consumer protection justification a further important case for regulation. This is the right to privacy, which is enshrined in various International conventions, including the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party. Under Article 17 of the ICCPR Australia has undertaken to 'adopt such legislative measures as may be necessary to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence'.

While Article 17 has been invoked primarily to support the Privacy Act 1988, which deals only with privacy of personal information, it is clearly equally applicable to door to door sales and solicitation, under both the 'privacy' and 'home' criteria.

The classic formulation of a right to privacy from the 19th Century American jurists Warren and Brandies, which has informed the development of modern privacy law, is ‘the right to be let (left) alone’. For most individuals, this right is most highly valued as it relates to their home (the other classic formulation, translated into our context, is ‘An Australian’s home is his castle’).

Submission: The Committee should recognise that while door to door selling may fall outside the scope of the Privacy Act 1988 it is very much a privacy issue, and appropriate regulation can therefore be justified on the basis of Australia’s commitment under the ICCPR to a wider set of privacy rights.

Interaction of Register and Stickers

We question how a Do Not Knock Register will interact with the now commonplace use of Do Not Knock stickers. If the effect of a register is to legitimise calls to premises displaying stickers but not registered, then it would be a significant backward step in consumer protection.

We assume that the reason why a purely sticker based opt-out scheme cannot be relied on is various operational difficulties such as proving that a sticker was sufficiently visible and/or had been seen by the caller, uncertainty that the sticker represented the current views of the current occupant etc.

A Register is therefore a good way of providing for householders to reinforce their wishes in a way that can be subsequently enforced. It should however remain an option for householders to display a Do No Knock sticker and for this still to be respected by industry codes of practice, rather than this practical and widespread, albeit imperfect, protection to be simply superseded and (partially) replaced by the registration scheme.

Who decides?

There is a practical difficulty in relation to a Do Not Knock Register and that is who has the right to register? Registration will presumably apply to specified premises, which may be occupied by multiple individuals, who will not necessarily agree on preference in relation to door to door marketing.

It will be necessary to define who has the authority to place premises on the Register – to provide the requisite consumer protection it should obviously be a residential occupant rather than an owner, but which occupant if there is more than one. If the right is to be restricted to a particular category of occupant e.g. the leaseholder or a joint owner-occupier, then there are issues of proof. It is presumably not intended that the scheme be so bureaucratic as to require production of evidence of entitlement in order to register. A sensible solution may be to simply the applicant for registration to declare that they meet the eligibility criteria (and make it an offence to make a false declaration). It would not be desirable however to require a witnessed statutory declaration as this would act a deterrent to registration.

Submission: The Bill should be amended to require that an applicant for registration should have to give an assurance that they had an appropriate standing to make the request in relation to the premises in question. A mechanism is required to deal with disputes between multiple occupants of the same premises expressing different preferences, but this could be dealt with by ACMA Guidelines.

Scope and application of a Do Not Knock scheme

We note that the proposed scheme is directed primarily at ‘marketing’, defined as being sales ‘calls’. This should certainly be the initial and primary focus.

The Bill expressly allows for ‘designated marketing calls’ from certain categories of organisation to override preferences indicated by registration. We submit that most of these exceptions are unjustified. The regulatory scheme should logically extend to any form of solicitation, expressly including charitable solicitations and political canvassing by large organisations. Individuals’ right to seclusion and privacy of their residential space (which may or may not also be their property), if they choose to register, should prevail over any commercial, charitable and political interests.

We would not wish to see registration prevent local community organisations, or neighbours, from initiating social contact with other residents in their locality, and a Do Not Knock register regime could be designed to ensure that this normal and valuable local activity could continue – it would in any case be unreasonable to expect local organisations or individuals to consult the proposed Register.

No such excuse should be made by large professionally organised operators, with teams of sales or canvassing staff, whether paid or volunteer (in the case of charities and political parties).

Charities and political parties have to date managed to exercise political influence to largely avoid having the other forms of privacy regulation apply to them – they are variously wholly or partly exempt from the Privacy Act 1988, the Spam Act 2003 and the Do Not Call Register Act 2006. The Privacy Foundation has never accepted the weak self-interested justification for these exemptions, and would oppose any similar exemption from a Do Not Knock Register.

Submission: The Bill should be amended to remove the exception for ‘designated marketing calls’. If necessary, a separate exception should be provided for door to door calls by individuals and local community groups, to ensure that such informal contact is not prohibited.

Enforcement

The Bill provides for remedies for breaches in the form of infringement notices, civil penalties and injunctions. Proceedings for civil penalties and injunctions may be instituted by the Registrar in the Federal Court or the Federal Magistrates Court. It is envisaged that the Australian Communications and Media Authority (ACMA) be responsible for promotion, administration and enforcement of the scheme. There may be an issue as to whether door to door sales falls within the jurisdictional competence of ACMA, but this could presumably be addressed in the legislation if changes to the ACMA legislation was required. An alternative regulatory model would be to make a breach of this Act an ‘interference with privacy’ under the Privacy Act 1988. While this would fit with the privacy justification for the scheme which we have advanced above, experience suggests that responsibility is best allocated to ACMA, given weaknesses both in the enforcement provisions of the Privacy Act and in the enforcement practice of successive Privacy Commissioners, which we have explained in our submission on the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, also currently before this Committee. ACMA, in contrast, appears to have a successful track record in administering and enforcing the comparable Spam Act and Do Not Call Register regimes.

Submission: We support the Australian Communications and Media Authority being given responsibility for the Do Not Knock Register scheme.

For further information please contact:

Nigel Waters 0407 230342 board5@privacy.org.au

Board Member
Australian Privacy Foundation

APF Web site: <http://www.privacy.org.au>

Please note that APF’s preferred mode of communication is by email, which should be answered without undue delay. APF does not have an organisational postal address. If postal communication is necessary, please contact the person named above to arrange for a postal address.