

Submission to the Do Not Call Register Statutory Review, October 2009

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In 2008, The Australia Institute carried out research into the social and economic impact of telemarketing, junk mail, spam and other forms of intrusive marketing. This yielded a number of insights, which are highly relevant to the upcoming Review of the Do Not Call (DNC) Register.

This submission to the Review consists of:

- Specific comments on the DNC Register and its operation
- The Australia Institute's research report, *Go Away, Please: The social and economic impact of intrusive marketing*, which includes detailed research findings about the impact of the Do Not Call Register.¹

In considering policies to reduce or eliminate unwanted telemarketing, the costs to individuals and households should be compared with the potential benefits of the various options for controlling the problem. Our research indicates that telemarketing has a sizeable social cost associated with lost time and productivity, personal irritation and the violation of privacy. We estimate this cost at around \$1.58 billion a year.²

In general terms, a more stringent compliance regime will impose greater costs on the telemarketing industry. However, stronger measures will simultaneously reduce costs to individuals, and these benefits will be realised across Australian society rather than in one small sector of the economy, some of which is based overseas.

Industry claims about the potential costs of expanding the DNC Register's coverage are exaggerated. The Australian Direct Marketing Association (ADMA) has called telemarketing 'the lifeblood of commerce in this country' and expressed concern that 'the expansion of the Do Not Call Register will stifle economic activity ... [and] jeopardize [sic] traditional commercial practice.'³ These assertions clearly do not reflect commercial and economic reality. In fact, it is a minority of businesses engaged in telemarketing that have brought about the need for regulation in this area.

The benefits of extending the DNC Register's reach, on the other hand, are likely to be considerable. In particular, reducing the volume of telemarketing will improve the alignment between public policy and community sentiment. Our survey results indicate that only 26 per cent of adult Australians believe that telemarketing should be permitted, and 63 per cent believe it should not. While the Australia Institute does not propose that telemarketing be banned altogether, there is ample scope for expanding the reach of the DNC Register in line with public expectations.

Our research shows that the DNC Register is having a noticeable effect on the number of unsolicited telemarketing calls received by householders. People on the Register reported receiving around 30 per cent fewer calls than those who are not on the Register (seven calls a

¹ J Fear, *Go away, please: The social and economic impact of intrusive marketing*, Discussion paper No. 104, The Australia Institute, December 2008.

² Survey data indicates that Australians on average receive 8.5 unsolicited telemarketing calls a month, with a typical call lasting for around one and a half minutes. This corresponds to 147 minutes per person per annum in time wasted on telemarketing. Using average weekly ordinary time earnings, the economic value of this time is equivalent to \$1.58 billion. This is probably an underestimate, since it takes account only of lost time but not other negative aspects of telemarketing, such as personal irritation and the violation of privacy. However, no estimate of the social costs of telemarketing can hope to be definitive, since it would need to account for these intangible effects.

³ R Edwards, *Direct: Marketing for Professionals*, ADMA, May/June 2009, p. 3.

month compared to 10).⁴ One of the objectives of the *Do Not Call Register Act 2006* is ‘to reduce the number of unwanted or unsolicited telemarketing calls that individuals receive’,⁵ so there is substantial scope for improvement in this area. It is therefore worth considering a range of options to determine what will be most effective in curbing unwanted telemarketing calls.

A key policy question in this area is whether an ‘opt-out’ or an ‘opt-in’ scheme is preferable. The department’s discussion paper states that that ‘an opt-in approach would have a significant adverse impact on organisations that rely on making telemarketing calls for their business activity’.⁶ In fact, any measure which contributes to the stated objective of the Act (‘to reduce the number of unwanted or unsolicited telemarketing calls that individuals receive’) would naturally have such an effect. The department’s concern appears to be that an opt-in arrangement would be *highly effective*. This is not sufficient reason to abandon an opt-in approach in favour of the less strict opt-out approach.

In fact, the *Spam Act 2003* employs an opt-in approach to regulating unsolicited bulk emails. The same principle should be applied to telemarketing, which is arguably a greater public policy problem and somewhat easier to control than spam. An opt-in system for telemarketing, in which people who want to receive telemarketing calls would place their numbers on a register, is also likely to generate strong public support.

The Australia Institute has proposed an approach that would combine the opt-in and opt-out approaches.⁷ An opt-in telemarketing register would allow individuals wishing to receive telemarketing calls to signal this intention to telemarketers.⁸ A separate opt-out telemarketing register would operate much like the current DNC Register, but it would allow individuals to signal their desire to receive *no telemarketing calls at all*, without exception. This system would give each member of the public three options:

- People who want to receive no telemarketing calls whatsoever would sign up to the opt-out telemarketing register.
- People who do not want to receive unsolicited telemarketing calls, but are prepared to accept the occasional call from organisations that are exempt (e.g. charities or political parties), would need to do nothing.
- People who are happy to receive all unsolicited telemarketing calls would sign up to the opt-in telemarketing register.

⁴ Recent research by Newspoll, commissioned by the Australian Communication and Media Authority, confirms that most people on the DNC Register receive fewer telemarketing calls after joining the Register (Newspoll, *Community Attitudes to Unsolicited Communications*, research report prepared for ACMA, 24 August 2009). However, this research did not investigate *the extent* of the reduction in calls—only whether there has been a reduction. This would be a key measure of the Register’s effectiveness, and an obvious area of weakness in the government-commissioned research. However, The Australia Institute has developed a method to assess the change in call volumes associated with the Register. See the attached research report for further details.

⁵ Department of Broadband, Communications and the Digital Economy, *Discussion Paper: Do Not Call Register Statutory Review*, October 2009, p. 6.

⁶ Department of Broadband, Communications and the Digital Economy, *Discussion Paper: Do Not Call Register Statutory Review*, October 2009, p. 6.

⁷ See the attached research report. A combined structure would reflect to some degree the system operating in Spain, where a ‘positive list’ complements a do not call register (known as the Listas Robinson, a reference to the privacy enjoyed by the Swiss Family Robinson). See C Connolly and A Vierboom, *Emerging Best Practice in Do Not Call Registers*, Galexia, August 2009.

⁸ The opt-in register could be operated privately (with oversight from government), and could even incorporate incentives or rewards for individuals to sign up. This would add a degree of reciprocity to what is currently a very one-sided exchange between individual and telemarketer.

We suggest that this broad structure would represent a much more effective way to meet the stated objectives of the *Do Not Call Register Act 2006*. However, the telemarketing industry is likely to dominate the debate surrounding this review, and to argue strongly for fewer controls on their activities. For this reason, we have several specific comments about the operation of the Register in its current form.

It is critical that the current system of exemptions to the Do Not Call regime is overhauled. So-called 'express consent' could be improved by ensuring that:

- Consent is not 'bundled', so that consent for one kind of approach is not interpreted as consent for all approaches at any time;
- Consent applies only for a limited time, such as three months from when it is given; and
- The ways that consent is solicited are clear and simple for consumers to understand.

'Inferred consent' currently applies where an individual is in an existing relationship with a commercial organisation, and has not explicitly said that they do not wish to be contacted for marketing purposes. Companies that provide ongoing services, such as financial institutions and telecommunications companies, currently have a natural advantage over companies that provide goods and services on a one-off basis, since they are able to make unsolicited telemarketing calls by claiming that they have inferred consent to do so. This situation is clearly at odds with how consumers understand the Do Not Call regime; there appears to be strong community opposition to companies being able to make unsolicited telemarketing calls to their existing customers. Indeed, inferred consent is probably responsible for many of the unwanted telemarketing calls that individuals continue to receive even after signing up to the DNC Register. Consequently, removing or strictly limiting the circumstances in which companies can claim inferred consent is likely to significantly reduce the burden of telemarketing on Australians.

Under the current system, charities and charitable institutions are exempt from the need to comply with the DNC Register. While the intention is admirable, this exemption means that many unsolicited telemarketing calls are made on behalf of charities in order to solicit donations. The firms making such calls are often private companies working on behalf of charities on a commission basis. The Australia Institute believes that such arrangements are not necessarily in the public interest, and that alternative ways to generate funds for charity would be more appropriate.

The Australian Communications and Media Authority (ACMA) appears to be operating the DNC Register effectively and according to its mandate. However, it is difficult to make definitive judgments about the success of the Register due to the limited range of statistics that ACMA currently publishes. The public would benefit from having access to information about:

- the types of complaints received to date (including complaints that fall outside of ACMA's purview, and the reason for this)
- the kinds of organisations which are the subject of complaints
- the volume of unsolicited telemarketing calls being made (perhaps through a regular survey of households).

People signing up to the DNC Register need to re-register after three years. There is no obvious reason why this should be case; registration is permanent for do not call registers in the USA,

India, Spain and the UK.⁹ The renewal requirement places an additional financial burden on ACMA and adds to the complexity of its task in managing the Register, for little or no public benefit. It is unclear why individuals would choose to remove themselves from the Register once they have signed up, but they still have the choice to do so at any time. It is also relatively easy for telecommunications companies (which are some of the most egregious perpetrators of telemarketing campaigns) to notify ACMA once a telephone number becomes inactive or is transferred to a new user. The Australia Institute therefore believes that numbers should remain on the DNC Register indefinitely until registrants remove them or ACMA is notified that they are no longer valid.

We note the department's interest in gathering feedback on industry codes and standards, and support any initiative to improve the behaviour of companies engaged in telemarketing. However, focusing on these issues distracts from matters of greater public importance, such as expanding the coverage of the Register and lowering the volume of unsolicited telemarketing calls. Improving industry codes and standards is a second-order concern, which can be resolved once the key features of a regulatory approach are put in place.

In summary, The Australia Institute proposes that:

- The Do Not Call regime is expanded to include an opt-in approach, in recognition of the social burden associated with unwanted telemarketing.
- The exemptions that currently apply are tightened substantially, so that companies cannot exploit loopholes in the rules to make unsolicited telemarketing calls.
- ACMA provides better information to the public on the performance of the Register over time.
- Telephone numbers remain on the Register indefinitely.
- The overall design of the Do Not Call regime is set in place before industry codes are refined.

These measures would ensure that arrangements to address unwanted telemarketing are in keeping with the original objectives of *the Do Not Call Register Act 2006*, including the need 'to reduce the inconvenience and intrusiveness of telemarketing calls'.¹⁰

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⁹ C Connolly and A Vierboom, *Emerging Best Practice in Do Not Call Registers*, Galexia, August 2009.

¹⁰ Department of Broadband, Communications and the Digital Economy, *Discussion Paper: Do Not Call Register Statutory Review*, August 2009, p. 5.

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Go Away, Please:

The social and economic impact of intrusive marketing

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Table of contents

Tables	iv
Acknowledgments	v
Abbreviations	vi
Summary	vii
1. Introduction	1
1.1 What is intrusive marketing?	1
1.2 Types of direct marketing	2
1.3 The rationale for direct marketing	3
2. Community attitudes to intrusive marketing	4
2.1 Previous research on direct marketing	4
2.2 Telemarketing survey	4
2.3 Coping with intrusive marketing	8
2.4 Implications	14
3. The policy response	17
3.1 The Do Not Call Register	17
3.2 International comparisons	20
3.3 Other policy arrangements	22
3.4 The economic dimensions of direct marketing	23
4. A new regulatory model	25
References	27

Tables

Table 1	Knowledge of and participation in the Do Not Call Register	5
Table 2	‘In your opinion, should telemarketing be permitted in Australia?’	6
Table 3	Number of unsolicited telemarketing calls per month	7
Table 4	Typical duration of telemarketing calls	7

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Abbreviations

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADMA	Australian Direct Marketing Association
ALRC	Australian Law Reform Commission
CEASA	Commercial Economic Advisory Service of Australia
DBCDE	Department of Broadband, Communications and the Digital Economy
DCITA	(Former) Department of Communications, Information Technology and the Arts
DNC	Do Not Call (Register)
FACS	(Former) Department of Family and Community Services
FTC	Federal Trade Commission (United States)
GDP	Gross Domestic Product
SMS	Short Message Service
TPS	Telephone Preference Service (United Kingdom)

Summary

Marketing is a common feature of modern life, and comes in various forms. ‘Traditional’ advertising takes place on commercial television and radio, in newspapers and magazines, and can be very expensive. Other forms of marketing are more intrusive, making a much stronger claim on the attention of consumers. These techniques, known collectively as ‘direct marketing’, include telemarketing, junk mail, junk faxes, email spam, face-to-face marketing and door-to-door sales. The direct marketing industry in Australia is big business, spending around \$12 billion per year—or more than one per cent of GDP.

Telemarketing is the target of a great deal of public criticism. In 2005, more than one billion telemarketing calls were made in Australia, and telemarketing was identified as the most annoying ‘event or situation’ in a study by the Australian Psychological Society. Responding to community concerns, in May 2007 the Australian Government established a Do Not Call (DNC) Register to enable members of the community to opt out of unsolicited phone calls. However, under the new system some organisations, including charities, political parties and companies with ‘inferred consent’, can continue to make such calls.

To explore community attitudes to telemarketing and to measure the impact of the DNC Register since its introduction, The Australia Institute conducted an online survey of 1,000 Australians. The findings show that:

- Australians on average receive 8.5 unsolicited telemarketing calls per month.
- The average telemarketing call lasts for 1.45 minutes.
- Eighty-five per cent of respondents had heard of the DNC Register, and around 40 per cent said their phone number is on the Register.
- People whose number is on the Register said they received fewer calls on average than those not on the Register (seven calls per month compared to ten calls). By this measure, the DNC Register appears to have reduced telemarketing call volumes by around 30 per cent.
- The value of time wasted on unsolicited telemarketing calls across Australia is estimated to be \$1.58 billion per year.
- Two in three respondents (63 per cent) said that telemarketing should not be permitted in Australia, while only 26 per cent said it should be permitted.

The Australia Institute also sought comments from people about their experiences with intrusive marketing and how they cope with it. Their feedback confirms that there is a great deal of negative feeling in the community about direct marketing, associated with the invasion of personal space, the use of personal details without permission, the waste of precious time, and the sheer absurdity and futility of much direct marketing.

Some people go to great lengths to avoid being ‘marketed’. They buy answering machines or caller ID devices, disconnect their phone altogether, install ‘no junk mail’

signs, send junk mail back to its source, and cross the road when a marketer is in their path. Millions of people have joined the DNC Register, and many take every opportunity to ‘unsubscribe’ from mailing or emailing lists. Despite their best efforts, it appears to be virtually impossible to avoid direct marketing altogether.

Telemarketing exchanges are especially fraught where there are communication barriers, which is common when telemarketers call from a non-English speaking country. Some people who are relatively inexperienced with telemarketing are caught unawares by recorded voice messages, and become even more annoyed when they realise they are not conversing with a human being. In addition, telemarketing can confuse or take advantage of vulnerable people like the elderly, the intellectually disabled, or those who are hard of hearing.

There is also frustration in the community about other forms of direct marketing. Residential letterboxes continue to receive massive amounts of junk mail, even where a ‘no junk mail’ sign is displayed. The increasing use of face-to-face marketing techniques in public spaces, shopping centres and other busy areas is changing the way that we perceive and interact with people outside of home and work.

To date, policies designed to mitigate the impact of intrusive marketing have relied exclusively on an opt-out approach. In other words, members of the public have to take deliberate action if they wish to avoid direct marketing, for instance by joining the DNC Register. However, our research indicates that an opt-in system would be more effective in reducing the social costs of direct marketing. Such an approach would assume that most people do not wish to receive direct marketing, while still giving everyone the opportunity to do so if they choose.

We therefore propose a new model for controlling and reducing direct marketing and the aggravation it can cause. This would be based on a combination of opt-in and opt-out elements, so that individuals can make more effective decisions about what kinds of marketing approaches they are prepared to accept.

The centrepiece of the new regime would be an *opt-in telemarketing register*. People who would like to receive unsolicited telemarketing calls could register their telephone number with a government body, such as the Australian Communications and Media Authority (ACMA), and telemarketers would be permitted to call only those numbers on the register. Any organisation calling an unregistered number without express or inferred consent would be subject to penalties.

In addition, a separate *opt-out telemarketing register* would allow members of the community to opt out of all unsolicited calls, including those that are currently exempt from the rules. This system would give each member of the public three options:

- People who want to receive no unsolicited telemarketing calls whatsoever would sign up to the opt-out telemarketing register.
- People who do not want to receive unsolicited telemarketing calls, but are prepared to accept the occasional call from organisations that are exempt (charities, political parties etc) would do nothing.

- People who are happy to receive all unsolicited telemarketing calls would sign up to the opt-in telemarketing register.

In addition to the opt-in/opt-out combination for telemarketing, members of the public should be allowed to signal their desire to opt out of junk mail, unsolicited faxes and door-to-door sales. This could be achieved through a *Do Not Mail Register*, a *Do Not Fax Register*, and a *Do Not Knock Register*, each of which would operate in a similar manner to the current DNC Register. A *Business Do Not Call Register* and *Business Do Not Fax Register* would also save time and money for those businesses who wish to opt out of unsolicited calls and faxes.

1. Introduction

1.1 What is intrusive marketing?

The scale and sophistication of marketing to Australian consumers has grown rapidly in recent decades. Most marketing activity takes place through ‘traditional’ vehicles like television or radio commercials, newspaper or magazine advertisements, or outdoor signs. While advertising can be irritating, for the most part it is relatively easy to ignore. You can turn off the television, turn down the radio, skip to the next page of the newspaper, or switch your gaze from the billboard to the traffic in front of you.

Good advertising, which captures the attention of the target audience and keeps it long enough to impart a message (‘buy this product now’), is highly sought-after and expensive; in 2007, a total of \$13 billion was spent on media advertising in Australia (Advertising Federation of Australia 2008). Corporations also spend a great deal of money on market research to find out how their target market thinks and which messages are likely to be more successful. But even with the best psychologists, statisticians and ‘creatives’, people often just switch off, literally or figuratively.

Some types of marketing, however, are more difficult to avoid. The techniques collectively known as ‘direct marketing’ make a much stronger claim on the attention of consumers, and are more likely to violate personal privacy. The Australian Law Reform Commission defines direct marketing as ‘the promotion and sale of goods and services directly to the consumer ... by mail, telephone, email or SMS’ (ALRC 2008, p. 890). Direct marketing (or direct selling) also takes place in person, by salespeople working in shopping centres, airports, public spaces and door-to-door. It differs from traditional advertising by being more intrusive and by demanding a response from consumers.

In 2005, around \$12 billion was spent on direct marketing—a figure roughly equivalent to the amount spent on media advertising and more than one per cent of GDP. The largest proportion was spent on telemarketing (\$3.2 billion, or 27 per cent of all direct marketing expenditure), followed by internet marketing (\$2.5 billion, or 21 per cent), catalogues (\$1.9 billion, or 16 per cent) and direct mail (\$1.6 billion, or 13 per cent) (CEASA 2006).

At that time, it was claimed that 695,430 people worked in direct marketing, including 229,000 in telemarketing, 184,000 in catalogues and 217,000 as ‘stuffers’ (that is, envelope stuffers) (CEASA 2006).¹ According to these figures, there are more people working in direct marketing than there are school teachers, nurses and doctors combined.²

¹ Census statistics show that only 10,548 people officially worked as ‘telemarketers’ in 2006 (ABS 2006). The Australian Teleservices Association estimated that 250,000 people worked in the Australian telemarketing industry in 2006, with 85,000 people involved in outbound calling. Possible explanations for the wide disparity in the employment figures for telemarketing are that call centre work tends to be a mixture of telemarketing and other activities, and that some telemarketers may be unwilling to nominate themselves as such on their census forms. It is also possible that the CEASA figures cited above are an over-estimate.

² Census figures show that in 2006 there were 288,704 people working as school teachers, 200,393 working as midwives or nurses, and 55,065 as medical practitioners (ABS 2006).

1.2 Types of direct marketing

Telemarketing

Telemarketing is perhaps the most intrusive form of direct marketing, and has attracted so much criticism around the world that many governments (including Australia, the United Kingdom, the United States, Canada and, most interestingly, India) have established ‘do not call’ registers to enable people to opt out of unwanted sales calls. In Australia, more than one billion telemarketing calls were made in 2005 (CEASA 2006). Three out of four callers to the National Privacy Phone-in in 2006 nominated unsolicited telemarketing as their number one privacy complaint (ALRC 2006). A recent survey by the Australian Psychological Society identified telemarketing as the ‘most irritating event or situation’ out of a list of 32—more irritating than bad drivers, unfriendly staff, excessive advertising, cigarette smoke, heavy traffic, or having to wait in line (Australian Psychological Society 2008; Hall 2008).

Junk mail

Junk mail is another familiar form of direct marketing. The average Australian letterbox receives around 12 unaddressed letters every week, compared with eight addressed letters (some of which are also junk mail, such as letters to ‘The Resident’) (Australia Post 2008). In 2005, \$428 million was spent on unaddressed junk mail and \$1.54 billion on addressed junk mail. In that year, the amount of paper used in catalogues alone (not including other forms of junk mail) was 368 kilotonnes, valued at \$574 million. In the United States, the greenhouse gases generated through the junk mail industry is estimated to be 51.5 million tonnes CO₂-e per year—equivalent to 9.4 million passenger cars, 11 coal-fired power plants, or 85,000 international flights on a 747 (Ford 2008). Junk mail, in other words, is big business.

Spam

It has been estimated that 90 per cent of all email messages are ‘spam’, the electronic version of junk mail (Moses 2008). Although most spam is diverted by filtering software (which households and businesses need to pay for), a great deal of time is also wasted sorting and deleting it from email inboxes. A 2004 study found that American workers spend an average of 2.8 minutes per day deleting spam, translating to a cost to the US economy of \$21.6 billion per year in lost productivity (Rockbridge Associates 2005). If Australian workers spent a similar amount of time dealing with spam, the total time involved would be equivalent to 72,603 jobs.³

Text messaging is an alternative vehicle for marketers to send unsolicited promotional messages. Although it appears similar to telemarketing, text messages are regarded by authorities in Australia as electronic communication (rather than voice calls), and—if unwanted—are considered to be spam.

³ The average Australian employee works 34.5 hours per week. Spending 2.8 minutes per day deleting spam five days per week equates to 0.68 per cent of their working time. Across 10,734,900 workers in Australia, this is equivalent to 72,603 jobs (ABS 2008c).

Face-to-face marketing

A growing form of direct marketing takes place in the street, in shopping centres, airports and other public places. It involves a direct approach by a salesperson seeking to sign people up to something, rather than an instant exchange of money—for example, a regular donation to charity, a mobile phone plan, a credit card or a gym membership. As such, these activities straddle a line between ‘promotion’ and ‘selling’. Although the purpose and location can vary a great deal, for the sake of brevity these practices are referred to in this report as face-to-face marketing.

Door-to-door sales are a more conventional form of direct marketing. Traditionally, door-to-door sales have been associated with vacuum cleaners, cosmetics, encyclopedias and life insurance, but more recent forms involve cable television, energy and gas contracts, and even educational software for children. Research by the Consumer Action Law Centre into consumer experiences with door-to-door energy salespeople found that ‘marketers are regularly taking advantage of consumers, particularly vulnerable, disadvantaged and culturally and linguistically diverse consumers’ (Consumer Action Law Centre 2007, p. 2).

1.3 The rationale for direct marketing

Large corporations regularly employ direct marketing techniques, and companies with ‘ongoing’ customers, such as telecommunications companies or financial institutions, can use personal details to contact their customers for marketing purposes. Commercial interests therefore advocate strongly for such activities to continue. For example, Optus recently told the Australian Law Reform Commission that direct marketing ‘serves an important economic function and is a vital component of Australian business’ (ALRC 2008, p. 895-6). The Australian Direct Marketing Association (ADMA) opposed any move to offer consumers the opportunity to opt out at each marketing approach, because ‘this ignored the need for organizations to communicate with their existing customers to “fulfill their wants and needs”’. It also argued that doing so would place Australian businesses at a ‘distinct commercial disadvantage’ internationally (ALRC 2008, p. 914).

In reality, of course, direct marketing does little to assist individuals to ‘fulfill their needs and wants’, and plays absolutely no role in securing Australia’s international standing. For most people, it is simply an unwanted intrusion into their lives, and some go to great lengths to avoid it. It is also a waste of valuable time, whether at home, at work or in public.

This paper is structured as follows. In Section 2, the amount of time Australians waste on telemarketing is quantified in order to calculate the overall economic cost of this particularly exasperating form of direct marketing; the approaches that ordinary Australians use to cope with intrusive marketing practices are also discussed. Section 3 reviews the Australian Government’s response to the negative social impact of direct marketing and compares this with policies from overseas. In light of the results of our empirical research, Section 4 proposes a new model for regulating direct marketing, incorporating an ‘opt-in’ scheme for telemarketing and new opportunities for Australians to opt out of junk mail and door-to-door sales.

2. Community attitudes to intrusive marketing

2.1 Previous research on direct marketing

According to research commissioned by the Office of the Privacy Commissioner in 2007, 80 per cent of Australians feel ‘annoyed’ or ‘concerned’ about unsolicited marketing material (Wallis Consulting Group 2007, p. 29). Yet because each experience of direct marketing is an isolated, fleeting experience (a phone call during dinner, or a piece of junk mail immediately discarded), it does not necessarily lead to sustained protest by individuals or community groups. Nevertheless, some committed individuals are prepared to challenge the right of commercial operators to impinge on their privacy. According to one person who took part in the ALRC’s recent inquiry into privacy law:

Some marketing organisation has gotten my details for on-selling, but I can’t get at the ‘source’. I can only tell marketers who contact me directly to remove my name from their individual lists. I want for the ‘source’ to be obliged to tell me on a regular basis ... what details they have on me, and give me the chance to have my details removed from their master list (ALRC 2008, p. 921).

Sustained criticism about telemarketing from members of the public was a major factor in the Howard Government’s decision to introduce a Do Not Call (DNC) Register. According to the Explanatory Memorandum to the *Do Not Call Register Bill 2006* (Cth): ‘Significant community concern in relation to the volume, inconvenience and intrusiveness of telemarketing practices has been observed by a number of different sources in recent times, including government bodies ... [and] private sector organisations’ (Commonwealth of Australia 2006, p. 4).

One of the most prominent users of direct marketing is the charity sector, yet many Australians find this kind of fundraising objectionable. A 2005 study commissioned by the Federal Government, *Giving Australia*, found that telemarketing is the most disliked way of being approached for charity donation. The great majority of respondents (78 per cent) said they dislike this method, compared with 11 per cent who were happy to be approached over the phone. Forty-two per cent of people said they dislike being approached for charity in a street or public place as against 36 per cent who did not mind. According to this report: ‘Invasive techniques were slammed. These were seen as tainting not just the nonprofit organisation involved but the sector itself’ (FACS 2005, p. 41).

2.2 Telemarketing survey

The Australia Institute commissioned an online survey of 1,000 people to gauge community attitudes to telemarketing and to measure its social and economic impact. The survey sample was representative of the adult Australian population by age, gender and state/territory, and respondents were sourced from a reputable independent online panel provider.⁴ Survey respondents were asked the following questions:

⁴ Respondents were drawn from the Valued Opinions Panel, which is owned and managed by the Australian arm of Research Now. It is a research-only panel (i.e. panel lists are not used to carry out any non-research activities, such as marketing) recruited from a wide variety of sources to avoid any bias associated with limited-source recruitment. Panel members are individually rewarded for their

- *In an average month, how many unsolicited telemarketing calls would you receive?*
- *How long does a typical telemarketing call last, from when you answer the phone until you hang up?*⁵
- *Have you heard of the Do Not Call Register?*
- *Is your telephone number(s) on the Do Not Call Register?*
- *In your opinion, should telemarketing be permitted in Australia?*

The great majority of respondents (85 per cent) were aware of the DNC Register. Around 40 per cent said their telephone number(s) is on the Register, while 48 per cent said it is not.⁶

Table 1 Knowledge of and participation in the DNC Register*

Response	Per cent
Heard of DNC Register	84.7%
Not heard of DNC Register	15.3%
Number(s) on the DNC Register	40.4%
Number(s) not on the DNC Register	48.3%
Not sure if number(s) on the DNC Register	11.3%
Total	100%

*Base = 1,000

Almost two in three respondents (63 per cent) said that telemarketing should not be permitted in Australia, while a quarter (26 per cent) said it should be permitted. Respondents listed on the DNC Register were more likely to believe that telemarketing should be banned, at 77 per cent. However, a majority of those not on the Register (53 per cent) also said that telemarketing should not be permitted.

participation in a survey at a level that helps to ensure reliable levels of response and considered answers to the questions, but not so high as to attract 'professional' respondents. In the case of this survey, the incentive for participation was \$2.00 per respondent.

⁵ Possible responses included: 'Less than 30 seconds', '30-60 seconds', '1-2 minutes', '2-3 minutes', '3-4 minutes', '4-5 minutes', '5-10 minutes', '10-20 minutes', '20-30 minutes', '30-60 minutes', 'More than 1 hour', and 'Not sure'.

⁶ These results accord with research carried out by ACMA, which found that 85 per cent of people had heard of the DNC Register.

Table 2 ‘In your opinion, should telemarketing be permitted in Australia?’*

Response	On DNC Register	Not on DNC Register	All
Telemarketing should be permitted	17.6%	33.5%	25.7%
Telemarketing should not be permitted	76.5%	53.0%	62.6%
Not sure	5.9%	13.5%	11.7%
Total	100%	100%	100%

*Base = 1,000

Respondents reported receiving an average of 8.5 telemarketing calls per month. Those on the DNC Register received an average of seven calls per month, while those not on the Register received ten calls. By this measure, *the DNC Register appears to have reduced the volume of unsolicited telemarketing calls by around 30 per cent.*⁷

As Table 3 shows, 17 per cent of respondents on the Register received no calls in an average month, 42 per cent received between one and five calls, and 31 per cent received more than five calls. Among those not on the Register, 11 per cent received no calls, 35 per cent received between one and five calls, and 44 per cent received more than five calls per month.

The average reported duration of telemarketing calls was 1.45 minutes.⁸ As Table 4 shows, around half of respondents (49 per cent) said that the average call took less than 30 seconds, while another quarter (24 per cent) said calls took between 30 and 60 seconds. Around one in five respondents (19 per cent) said that telemarketing calls usually took more than a minute.

Based on an average of 8.5 unsolicited telemarketing calls per person per month at an average duration of 1.45 minutes, we can calculate that the average Australian spends approximately 12.3 minutes per month answering telemarketing calls, or 147 minutes per year. Using average weekly ordinary time earnings for full-time workers, *the value of time wasted on telemarketing in Australia is estimated at \$1.58 billion per year.*⁹

⁷ Although respondents were asked about ‘unsolicited telemarketing calls’, it is possible that some included other kinds of unsolicited phone calls, notably market research calls, in estimating the number of calls they receive per month. However, because market researchers can call numbers on the DNC Register, the difference in average call volumes between registered and unregistered numbers is likely to remain valid.

⁸ Average duration was calculated by using the following durations for each of the categories in Table 4: 0.5 minutes for ‘Less than 30 seconds’, 0.75 minutes for ‘30–60 seconds’, 1.5 minutes for ‘1–2 minutes’, 2.5 minutes for ‘2–3 minutes’, 3.5 minutes for ‘3–4 minutes’, 4.5 minutes for ‘4–5 minutes’, 7.5 minutes for ‘5–10 minutes’, 15 minutes for ‘10–20 minutes’, 25 minutes for ‘20–30 minutes’, 45 minutes for ‘30–60 minutes’, and 60 minutes for ‘more than 1 hour’.

⁹ Full-time adult ordinary time earnings in May 2008 were \$1,132.20 (trend estimate), or \$30.19 for each hour in a standard 37.5 hour week (ABS 2008a). The Australian population as at March 2008 was 21,282,600 (ABS 2008b). If each Australian spends approximately 147 minutes on telemarketing in a year, this equates to a cost across the Australian population of \$1,578,847,099.

Table 3 Number of unsolicited telemarketing calls per month*

Calls per month	On DNC Register	Not on DNC Register	All
None	16.6%	10.6%	13.8%
1-2	16.3%	15.3%	15.7%
3-5	26.5%	19.3%	21.4%
6-10	18.8%	20.1%	19.2%
11-20	7.7%	14.3%	11.2%
21-30	2.5%	4.3%	3.4%
31-50	1.0%	3.3%	2.0%
More than 50	1.0%	1.4%	1.2%
Not sure	9.7%	11.4%	12.1%
1-5	42.8%	34.6%	37.1%
More than 5	30.9%	43.5%	37.0%
Total	100%	100%	100%
Average calls per month	7.04	10.02	8.50

*Base = 1,000

Table 4: Typical duration of telemarketing calls*

	Number	Per cent
Less than 30 seconds	487	48.7%
30-60 seconds	236	23.6%
1-2 minutes	86	8.6%
2-3 minutes	34	3.4%
3-4 minutes	12	1.2%
4-5 minutes	28	2.8%
5-10 minutes	14	1.4%
10-20 minutes	11	1.1%
20-30 minutes	4	0.4%
30-60 minutes	2	0.2%
More than 1 hour	1	0.1%
Not sure	85	8.5%
Total	1000	100%
Average duration	1.45 minutes	-

*Base = 1,000

2.3 Coping with intrusive marketing

People deal in many different ways with the growing amount of marketing and advertising that is an enduring feature of modern life. To explore these different responses, The Australia Institute asked its members the following questions by email:

- *How do you feel when you pick up the phone and realise it's a telemarketer?*
- *What strategies do you use to avoid telemarketing? Do they work?*
- *What strategies do you use to avoid street spruikers (or aggressive salespeople in other public spaces)? Do they work?*
- *What strategies do you use to cope with junk mail? Do they work?*

Sixty-six responses were received, including 55 by email and 11 over the telephone. Comments are summarised below.

Immediate responses to telemarketing

When asked how they feel answering a telemarketing call, people's responses were almost universally negative. Some reported having almost physical reactions to telemarketing, identifying their 'stomach' or 'heart' as a source of the discomfort.

I always feel rotten in the pit of my stomach. I hate the intrusion into my private life.

My heart sinks.

My heart sinks when I pick up the phone and it is a telemarketer as it is usually when I am tired after a hard day's work or in the middle of making dinner.

Totally fed up and invaded.

Let down, frustrated, angry.

A bit depressed, edgy and irritated. Then relieved it was me who picked up the phone instead of my husband because he gets really mad and yells at them.

Guarded and somewhat violated. Perhaps that is too strong a word, but home is a 'safe place' from the world of commerce and people wanting something from me. When this is compromised by telemarketers bringing that environment into my home, I am generally displeased.

There are people who enjoy having telemarketers call because they're lonely. I'm not one of those.

People gave various reasons for disliking telemarketing, including the timing of calls, the use of recorded messages, the types of organisations calling, the strong accents of telemarketers, and their effect on vulnerable people.

I got two phone calls recently with someone saying, 'Congratulations, you've won a million dollars!' The second time I realised that it was a recorded message. That's a first for me. But it's in the same category as a voice call—it's just a damned nuisance.

Their strategy has changed: we now pick up the phone only to hear a recorded telemarketing message. That's more frustrating than a real person. At least with a real person you have the choice of slagging him/her off. No such luxury with a recording!

I get annoyed because of the timing—six or seven in the evening. From their point of view, it's an appropriate time, but from our point of view, it's highly inappropriate. It's an invasion of my personal space and therefore my privacy.

The ones that do phone are banks etc asking if everything is okay with my account and can they do anything for me (presumably sell me some product). They really irritate me for it would take an hour to tell them all the wrongs with their money-grubbing and corrupt establishments and apart from me getting angry, I know it's useless!

One of the old ladies I look after as a volunteer, they take advantage of her and tell her she's won a free holiday, which of course she's delighted about. She had to get a silent number, but she forgot to tell me. That made it much more difficult to provide care to her—we couldn't track down her new number.

Ambivalence about the role of telemarketing

Many members described feeling ambivalent when dealing with telemarketers, knowing that the intrusion is not the fault of the individual calling. Indeed, some had a great deal of sympathy for telemarketing workers, particularly those from overseas.

I try to be polite, because I know it's just their job. But it's hard when you get four or five calls in one day.

I am a bit ashamed to say but whenever there is a lengthy delay after the phone rings and I pick up and a sub-continental voice comes on, I hang up immediately. I feel guilty about this because sub-continental call centres are relatively good jobs in these areas and they are just trying to make a living.

I feel awkward because on one level I feel sorry for them. On the other hand, I feel annoyed at such a personal medium being used uninvited to try to extract money from me.

I feel dismayed/disappointed for myself that it's not someone more interesting calling, slightly angry at the corporation intruding/disrespecting my privacy, but mainly sorry for the person calling me as I suspect most people cut them off rudely or hang up and I know I am about to say no thanks and hang up too, which must be painful and frustrating for them when it occurs so repetitively. They have a bad job.

Dealing with telemarketers

People described a wide variety of approaches to dealing with telemarketing. These ranged from a simple, polite 'not interested' to much more involved techniques. Some people make use of answering machines to screen calls, some have silent numbers, while others have terminated their landline phone service altogether to avoid telemarketing calls.

I leave the answering machine on all the time. Yes, it works, but costs more money because I end up having to call people back, which means there are two phone calls instead of one. This must double the income for phone companies, and must add to network congestion.

We have an unlisted VOIP phone number and now don't get any telemarketing calls.

One of the main reasons I gave up my landline was the intrusion of telemarketing. This strategy worked well and in the end saved me a lot of headaches and money. It is also significantly cheaper to use a mobile than pay Tel\$tra. I hate telemarketing with a vengeance.

To avoid telemarketing, I have a silent number.

Once I got so angry with repeated calls in one day that I slammed down the phone and broke it. This obviously fixed the problem in the short term. After I broke the phone (and fixed it), I stopped answering my home phone and I only use it to make outgoing calls.

I haven't put my name on any 'Do Not Call' register. I figure that would only help them not to waste money calling me. And I would like them all to go broke in a spectacular fashion.

If the call says 'overseas' on the dialer, I don't answer it. Unfortunately, my eight-year-old does, with some enthusiasm!

I tell them to hold on, put them on hold and go away. Every second they're on hold is costing them money. Or I keep them talking as long as possible. I ask to be put through to their manager, then I hang up.

I can detect a telemarketing call even as it rings (well, almost). I now simply put the phone down without a word being said.

I sometimes say that I am a professional feedback giver to telemarketing and that I charge \$100 for the first ten minutes and \$20 every minute after that and I accept all cards except AMEX and Diners. (It usually gets a response and I feel better!)

I cut them off straight away. I don't have time to listen to what they have to say.

The worst but easiest to handle are the recorded voices, for example telling you that you have a won a prize. Obviously some people fall for this nonsense, a depressing thought.

They ask, 'How are you', which annoys me as they could not care less. I do not answer but when they ask again I reply 'eighty and dying' (which is nearly true) and they get off quite quickly.

Coping with junk mail

Many people reported throwing junk mail away immediately, although some would look at certain material, such as advertising for local businesses. Some people had more imaginative ways to deal with junk mail. One person reported collecting junk mail in order to reclaim land in his backyard taken up by a swimming pool that is no longer used: 'Any junk mail goes into the pool as landfill, along with old newspapers, straw and so on', said this man. Others send junk mail back to the sender, requesting to be taken off the mailing list.

I have been known to send companies back their junk mail in the free post envelopes they provide. Once I also phoned a company advising that they had delivered a vast amount of junk to my letterbox despite the sticker requesting none, and indicating that I would take further action unless they instructed their delivery people to respect 'no junk mail' signs.

One way to combat junk mail is to send the stuff back in their own return envelopes—you chuck all the junk mail in there. If you don't get an envelope they have a policy that they have to pay for any mail that comes in, so you put it in a plain envelope with no stamp and they have to pay to get their own junk back.

I have a post office box and just throw them in the bin the post office provides.

I haven't found a way to avoid junk mail other than to throw it in the garbage.

Unfortunately, I cannot do much about the number of junk mail brochures that come out of The Canberra Times on a daily basis. They are even too glossy for the compost bin or for under mulch.

From an environmental and consumer perspective, I hate it. In this age when we should be concerned about natural resources I find it offensive that companies do this to me. I don't even look at it. It goes straight in the recycling.

'No junk mail' signs

One of the most common approaches to avoiding junk mail is to attach a 'no junk mail' sign to the letterbox. Opinions were divided over whether this is a successful approach.

My no junk mail sign works with everyone but real estate agents. They say it's not junk, it's information. I've had a lot of arguments with real estate agents over this.

My no junk mail sticker works. Australia Post seems to be the only one that ignores the sign.

I have a sticker on my letterbox, which works well—the only people who seem to ignore it are real estate agents and the political parties! What I can't control is the volume of junk that comes with the newspaper. That really makes me cross.

I have a sign on my mail box, but it isn't working. They either ignore it, or throw a bundle of mail down the drive or have it delivered by Australia Post within regular mail.

Having been a letterboxer for a community group, I felt guilty and intimidated by such stickers, even though community material is generally exempted from the 'junk mail' category.

I put a note on the mailbox, notify the post office, send it back in a clean envelope with no stamp and no return address. I may also include a note to bugger off.

I have a no junk mail sign on the letterbox, but we still get junk mail. Companies like Foxtel send advertising mail addressed to the resident, which I find very devious and infuriates me.

Coping with face-to-face marketing

A commonly reported way of dealing with face-to-face marketing is to 'avoid eye contact'. Other people tend to be more proactive.

Avoid eye contact at all costs; feign deafness; display unshakeable concentration on whatever mundane thing you are doing at the time. These simple strategies generally work for me. If they don't then—ironically—piercing eye-contact must be made with an unequivocal 'No' to whatever is being peddled.

Pretending to be on my mobile phone and/or avoiding eye contact.

Take a wide arc when walking past them. Avoid eye contact. Politely but firmly say 'No thanks' with a smile. It works for me, but I'd prefer if they didn't exist, along with most visual pollution.

Generally, I hold my palm up, spread out towards them and look away shaking my head. That works most of the time.

If you're in the airport, just pretend you're in a rush. They don't talk to you.

I just pretend I don't see them! Yes, it does work. Possibly because I'm white haired, don't look wealthy and am 68!

With regard to public/street spruikers, I find that they present one of the rare situations when being disabled offers an advantage. I walk with a stick and need to watch the ground to maintain my balance and movement. I thus completely ignore them and focus on the task of ambulating. If they are particularly aggressive or insistent (which is very unusual), the accidental placement of the stick on a foot or instep tends to be useful.

You need to glare at them hard enough. I usually just shake my head and walk on, but sometimes I get a bit more cross.

Smile politely and walk on. No point getting angry or aggressive as that's bad for your blood pressure and some of them (e.g. charity workers) are just trying to make a difficult living.

Direct marketing for charity

A number of people expressed views about the use of telephone and face-to-face marketing to raise money for charity. Views were mixed on the legitimacy of such techniques, but many people were of the opinion that such fundraising can actually undermine the goodwill that people feel towards charitable organisations.

I'm a real softy for a good charity case. But this makes me feel very uncomfortable. As a consumer it actually puts me off.

With charities, I tell them truthfully that I already give money away. I look at them as intrusions into my life, whatever they're calling for, whether it's a charity or not.

I find it much more difficult to deal with charities, many of which are quite worthy. I usually indicate that I do not negotiate over the phone. If they persist I may then tell them that I have already allocated my main charity donations, something I budget for at the beginning of each financial year.

Charities think they should be treated differently, but I do not think they should be allowed to call either. People should decide carefully where to give money rather than be hassled on the phone, usually at an inconvenient time.

I tend to give them the chance and I subscribe as it were to three or four charities each year, but I am becoming more disenchanted with charities using telemarketing techniques to obtain donations or sell tickets in raffles.

Telemarketing infuriates me. I hang up in their ear before they can get going. The only exception is when I find it is the Wilderness Society or Amnesty who are doing it—which tests my loyalty to these wonderful organisations rather severely.

I run a charitable organisation and I would never adopt this method of fundraising. I think it can be counterproductive.

A lot of the street hawkers are from charities I support. As long as the money gets to the charity it's okay.

General attitudes to direct marketing

As well as reporting how they cope with telemarketing, junk mail and face-to-face marketing, members had comments on the general phenomenon of direct marketing. Some people were concerned about the invasion of privacy, while others were keen for policy-makers to do more to address the problem.

In principle, it's wrong. If we can't market without invading other people's privacy we shouldn't do it. There should be some space in the world where I'm not expected to be a consumer.

It's a real concern when they take advantage of vulnerable people who don't understand what they're getting into.

I can choose not to read the ad in the paper or listen to the ad on TV and I buy the paper and turn on the TV knowing there are going to be ads. I don't know that the phone call is from a telemarketer.

They sometimes ask for my date of birth. I don't give it to them, to avoid identity theft.

I'm fed up with the government pretending they're not in the business of regulating, and bowing to corporate pressure. They can find a way to generate business without ringing me up or spamming me or sticking things in my letterbox. They're clever. They can figure it out.

I'd like to see them act on the Do Not Call Register more, have a more active system. Prosecute companies that flagrantly disregard it.

I can't see it being of any benefit to anybody. We can argue on the grounds of privacy that we shouldn't have unsolicited calls at all.

Nowadays it's getting harder to walk around public spaces. You have to zigzag your way around these stalls selling everything and anything.

2.4 Implications

As the comments above testify, there is a great deal of negative feeling in the community about direct marketing. This resentment stems from the invasion of personal space (including the most personal space, our homes), the use of personal details without permission, the waste of precious time and the sheer absurdity and futility of much direct marketing.

Some people go to great lengths to avoid being 'marketed'. They buy answering machines or caller ID devices, disconnect their phone altogether, display 'No Junk Mail' signs, send junk mail back to its source, and cross the road when a marketer is in their path. Millions of people have joined the DNC Register, and many take every opportunity to 'unsubscribe' from mailing or emailing lists (although they may not have actually 'subscribed' in the first place). Despite their best efforts, it appears to be virtually impossible to avoid direct marketing altogether.

Apart from the direct impact on people's lives, telemarketing appears to affect the nature of human interaction in strange ways. Many report being torn between irritation at the intrusion and a desire to be civil to someone who is doing a difficult job. Some people are simply outraged at getting unsolicited sales calls and take out their frustration over the phone. Others use humour to convey their desire not to participate in telemarketing. Interestingly, telemarketers themselves can also lose some of the 'authenticity' of human interaction through their work. In 2006, journalist Drew Warne-Smith embedded himself in an Australian call centre to experience first-

hand what being a telemarketer is like. At the end of his shift, he made the following observation:

My words have begun to lose their meaning—at least to me. I feel detached from my own voice; my language is an empty vessel. *What am I selling again? What does this charity actually do? What did I just say?* I've spoken to dozens of people without a single conversation (Warne-Smith 2006).

Telemarketing exchanges are especially fraught where there are communication barriers, which is common when telemarketers call from a non-English speaking country. Some people who are relatively inexperienced with telemarketing are caught unawares by recorded voice messages, and become even more annoyed when they realise they are not conversing with a human being. In addition, telemarketing can confuse or take advantage of vulnerable people, like the elderly, the intellectually disabled, or those who are hard of hearing.

Although junk mail is generally disliked, many appear to have accepted it as a fact of life. Letterboxes adorned with 'no junk mail' signs are very common but are not always successful in eliminating, or even reducing, junk mail; real estate agents are said to be the most common culprits in flouting such signs. Addressed junk mail is even more difficult to avoid, since Australia Post will always deliver such letters even where it is obviously junk mail (for example, addressed to 'The Resident' or 'The Householder'). There is less ill feeling about junk mail compared with telemarketing, because it does not impose itself on personal time and space to the same extent. It simply ends up in the bin, recycling or compost, prompting concern about the environmental consequences.

Face-to-face marketing—and to a certain extent advertising in general—is changing our experience of public spaces, which are increasingly locations for commercial promotion. The popularity of large, enclosed shopping centres means that people spend more of their leisure time in spaces that are privately owned and managed and where marketing activity is more likely to occur. Shopping centres are often the busiest parts of a community, functioning as gathering places like streets and town squares in the past. The saturation of these quasi-public spaces with marketing messages reinforces our status as perpetual consumers and can even train us to be rude to fellow community members.

Face-to-face marketing is a popular method for certain charities to raise money. Such charities often support causes that naturally appeal to people's sense of compassion, but many people are sceptical about this form of fundraising even if the cause is worthy. For those people who set aside money to donate to their chosen charities, being asked to give more in such an abrupt manner can cause resentment. In fact, the feedback we gathered suggests that charities may be undermining the very goodwill they are seeking to cultivate. There are obvious short-term financial benefits for individual charities who engage in face-to-face and telemarketing, but such practices may ultimately work against the long-term interests of the charity sector.

The value of the time wasted by Australians on telemarketing is estimated to be \$1.58 billion per year, and two in three Australians believe that telemarketing should be not be permitted at all. Given the level of community frustration with direct marketing, and outright hostility towards telemarketing, there is strong case for strengthening the

way in which direct marketing is controlled in Australia. The following section describes current policies to address intrusive marketing in Australia, and considers alternative approaches. In Section 4, a new model for regulating intrusive marketing is proposed.

3. The policy response

3.1 The Do Not Call Register

Features of the Register

The most prominent Australian Government initiative to address direct marketing is the DNC Register, a government-administered scheme enabling people to opt out of receiving unsolicited telemarketing calls. Under the *Do Not Call Register Act 2006* (Cth), it is illegal to make unsolicited telemarketing calls to a number listed on the register unless express or inferred consent has been obtained to do so (ACMA 2008a). The Register came into effect in May 2007 and is administered by ACMA.

Certain key groups are exempt from the prohibition against calling numbers on the DNC Register, including charities, educational and religious organisations, registered political parties, independent members of parliament, electoral candidates and government bodies (ACMA 2008b). Given the official definition of a telemarketing call,¹⁰ some types of unsolicited calls are outside the scope of the scheme: genuine market research and opinion polling, product recall, fault rectification, appointment rescheduling or reminder, and calls relating to payments (ACMA 2008c). In addition, telemarketers are able to call numbers on the register when they have ‘inferred’ consent to do so—i.e. where they ‘have reason to believe that a person is willing to receive a call, based on the conduct of the person and the business or other relationship that exists between the person and the telemarketer’. There are guidelines governing when consent can be inferred; these mean that current customers (of a financial institution or a telecommunications provider, for example) can continue to receive telemarketing calls (ACMA 2008d).¹¹

The budget for the operation of the DNC Register is \$33.1 million over four years, including ‘less than \$8 million’ per year once the Register is established. Around half of the total cost of operation (\$15.9 million) is expected to be recovered from the telemarketing industry through fees to access the Register (Commonwealth of Australia 2006, pp. 3, 21).

Sources of contention

During the Government’s consultation on the final form of the DNC Register, community and business groups expressed a range of concerns about how the scheme would operate. These related to its general design (i.e. ‘opt-in’ versus ‘opt-out’), the exemptions that would apply, and the numbers that could be listed on the Register.

From the perspective of individual members of the public, the most crucial aspect of any scheme to prevent unwanted telemarketing calls is whether it is opt-in or opt-out. Under an opt-in scheme, individuals would need to register their name or number if

¹⁰ ‘A voice call made to a telephone number to offer, supply, provide [or] advertise goods or services, land or an interest in land, or a business opportunity or investment opportunity; [or to] solicit donations’ (ACMA 2008c).

¹¹ The Australian Privacy Foundation has raised concerns that ‘the exemption based on inferred consent exemption based on inferred consent through pre-existing business relationships is far too wide and will allow for many unwelcome calls purely on the basis that the consumer has made enquiries or had minor dealings a long time ago’ (quoted in Nielson 2006, p. 12).

they wish to receive telemarketing calls, otherwise telemarketers would be prohibited from calling them. For the majority of households, this would mean that no action would be required to prevent them receiving such calls. By contrast, the present scheme uses an opt-out approach, where individuals who are concerned enough about telemarketing must actively register. Most do-not-call schemes operating in other countries are opt-out, and the Australian Government argued that an opt-in scheme ‘would be likely to impact negatively on the telemarketing industry’.

Under an opt-in scheme, consumers using telemarketing services are likely to be adversely affected as there is likely to be an impact on the telemarketing industry as some organisations might close or choose other marketing strategies. The choice of services and convenience provided by telemarketing sales for these consumers is likely to be reduced. (Commonwealth of Australia 2006, p. 22–3)

The Government ultimately favoured an opt-out system, saying that this ‘approach is unlikely to affect the total sales revenue of telemarketing businesses because only those persons who would be unlikely to use telemarketing services would register and persons who wish to continue to use telemarketer’s [sic] services will continue to do so’ (Commonwealth of Australia 2006, pp. 18-9).

Not surprisingly, the Australian telemarketing industry was heavily in favour of an opt-out scheme. According to a spokesman for the Australian Direct Marketing Association: ‘The important thing is to keep telemarketing open for the vast majority of responsible companies as a legitimate communication channel with consumers, and not to have unnecessary job losses’ (Lloyd 2004). Consumer groups, on the other hand, preferred an opt-in approach (Australian Consumers’ Association 2005). As the Office of the Privacy Commissioner neatly observed, ‘consumer organisations favour opt-in and businesses, business organisations and charities favour opt-out’ (2005, p. 97).

Another source of contention has been the exemptions that now apply to the restrictions on telemarketing. Community groups called attention to the wide range of organisations, which could continue to make unsolicited calls under the DNC Register system.

Many, if not most, of the unwelcome calls that are received will fall within one or other of the exemptions. There is no justification for the exemptions for political parties, charities and educational institutions—there are many other ways for these organisations to achieve their legitimate objectives without making unsolicited phone calls (Australian Privacy Foundation quoted in Nielsen 2006, p. 6).

Referring to the exemptions applying to political parties, members of parliament and electoral candidates, Senator Natasha Stott Despoja said, ‘It is utterly hypocritical for politicians to expect business, industry and community groups to comply with privacy laws which they, themselves, are unwilling to comply with’ (quoted in Nielsen 2006, p. 7). Even the direct marketing industry was critical of this aspect of the legislation: ‘The Bill has such broad ranging exemptions ... that consumers will continue to receive an unacceptably high volume of unsolicited calls’ (ADMA quoted in Nielsen 2006, p. 5). The Government defended its decision to include the exemptions, saying

that ‘the public benefit in allowing some exemptions is considered to be greater than the potential risk that some consumers may continue to receive some unsolicited calls’ (Commonwealth of Australia 2006, p. 21).

A third source of division has been the types of numbers that can be included on the DNC Register and, in particular, the decision to limit the Register to private (i.e. non-business) telephone numbers. Initial media reports indicated that the Government had intended to incorporate business numbers into the scheme, but heavy lobbying by the telemarketing industry resulted in their exclusion (Shoebridge 2006; Switzer 2006). As one telemarketing manager said: ‘There are local Australian telemarketers who do a fair-dinkum job who will get the short end of the stick because we’ll be driven out by (overseas) call centres’ (Switzer 2006).

The decision to exclude business numbers from the Register came despite strong concerns from the small business sector, which ‘indicated that unsolicited telemarketing call approaches are time consuming and costly ... as they use valuable resources that congest fax and telephone lines potentially resulting in loss of business opportunities’ (Commonwealth of Australia 2006, p. 12). The Rudd Government is currently considering making business numbers and fax numbers eligible for the Register and has recently released a consultation paper to this effect (Department of Broadband, Communications and the Digital Economy 2008).

Impact of the Register to date

The DNC Register received 1.04 million registrations within the first month of operation. By October 2008, 2.62 million numbers had been registered and 1.38 billion numbers had been submitted to ACMA for ‘washing’ (i.e. checking against the Register) (ACMA 2008f). Because the exact level of telemarketing activity prior to its introduction is unknown, it is difficult to ascertain the extent to which the Register has succeeded in reducing unwanted telemarketing calls. Indicative patterns can be inferred from workforce data (e.g. the number of people employed as ‘call centre workers’) or from the level of commercial spending on marketing activity. However, both of these measures are an unreliable way to assess the level of telemarketing, particularly as more operations move overseas.

Lack of baseline data is also a problem when assessing the number and nature of complaints about telemarketing. Before May 2007, complaints were handled by various state and Commonwealth agencies, including Offices of Fair Trading, Privacy Commissioners and the Australian Competition and Consumer Commission (ACCC), and lines of responsibility were blurred. Since May 2007, complaints about telemarketing have been the responsibility of ACMA, a Commonwealth body.

In the year to June 2008, ACMA received a total of 28,804 complaints about telemarketing, 81 per cent of which raised potential breaches of the law and/or the industry standard. The most frequent source of complaints involved telecommunications providers, attracting 55 per cent of all complaints. ‘Holiday promotions’ drew 22 per cent of complaints, ‘contracted call centres’ 11 per cent, financial institutions six per cent, and real estate agents two per cent (AMCA 2008e, p. 42). According to ACMA, the pattern of complaints reveals that ‘most telemarketers have adjusted well to the DNC Register and are doing the right thing’, that ‘complaints are largely driven by wide-scale non-compliance by a small section

of the industry', and that 'the telecommunications industry has more work to do than other industries'. Problems have tended to arise particularly where Australian companies have contracted offshore call centres to carry out telemarketing but have failed to monitor their activities.¹²

Since the introduction of the DNC Register, ACMA has commenced 24 investigations, resulting in five infringement notices. The largest fine imposed was for \$147,400, against Dodo Australia (an internet and telephone service provider). Importantly, ACMA's policy is to 'resolve compliance issues informally (i.e. without the need for formal investigatory or enforcement action) wherever possible and appropriate ... It is only where such informal contact is unsuccessful (or where a matter is particularly disruptive to consumers) that ACMA may proceed to take formal action'. Such an approach 'enables ACMA to focus its limited investigatory resources¹³ on those remaining telemarketers that are either unwilling or unable to correct their compliance issues' (ACMA 2008e, p. 43).

A small study with Australian consumers, commissioned by ACMA in April 2008, found that 85 per cent of online survey respondents had heard of the DNC Register and 93 per cent said it was a useful initiative. The majority of respondents on the Register (87 per cent) indicated that the number of telemarketing calls they received was lower than it was prior to registering.¹⁴ However, our survey results suggest that the reduction in call volumes is not large—around 30 per cent on average.

The continuing strength of telemarketing activity is supported by a 2008 survey of 54 large Australian call centres. The vast majority of these (92 per cent) said that the Register had had no impact on outbound calling volumes, while 91 per cent said that it had had no impact on their 'campaign success rates'. A spokesperson for Dimension Data, which commissioned the research, described the findings as 'really heartening ... In the lead up to the introduction of the Register last year, there was a lot of anxiety as to its potential negative impact on Australia's contact centre industry ... What they are doing very well with is inbound marketing campaigns and outbound customer satisfaction and 'update' calls: recognizing cross-selling opportunities during these types of calls with existing customers' (Dimension Data 2008).

3.2 International comparisons

A number of countries have introduced schemes similar to the DNC Register. Although each is configured differently, most adhere to the 'opt-out' model. Some are run by government agencies, while others are administered by industry bodies and supported by government sanction and codes of practice.

United States

The US Do Not Call Registry came into operation in 2003 and now includes 172.5 million numbers. Because US law prevents telemarketers from using automatic dialers to call mobile phone numbers, Americans do not need to register their mobile phone numbers (although the Registry still accepts such numbers). Likewise, fax numbers do

¹² Correspondence from ACMA.

¹³ According to correspondence from ACMA, the Telemarketing Investigations section currently employs a total of 12 full-time staff, with an annual section budget of 'slightly over \$1 million'.

¹⁴ Correspondence from AMCA.

not need to be registered because other laws prohibit the sending of unsolicited faxes. The Registry is administered by the Federal Trade Commission (a government body) and covers only personal numbers (i.e. not business numbers). Political parties, charities and market researchers are exempt from the rules governing unsolicited calls, as are organisations with an established business relationship with the individual being contacted (Federal Trade Commission 2008).

A distinctive feature of telemarketing in the US is the use of prisoners to conduct telemarketing work. Prison labour is cheap; telemarketing work earns inmates less than \$2 a day—although one telemarketing manager said he hired prisoners because ‘I need people who are there every day’ (Associated Press 1999). Federal Prison Industries, Inc is a wholly owned government corporation within the Department of Justice, which ‘provide[s] employment and training opportunities to inmates in federal custody’. It defends prison-based telemarketing work, saying that it ‘provide[s] inmates with an opportunity to develop work ethics and skills and ... contribute[s] substantially to lower recidivism and increase[d] job-related success for inmates upon their release. In addition, the money earned by inmates ... is used to offset the costs of incarceration by taxpayers and to provide restitution to victims’ (Unicor Federal Prison Industries, Inc 2002). There are tight restrictions on which information is available to prisoners engaged in telemarketing, but privacy breaches have occurred, including a letter sent to a 15-year-old girl by a prison inmate ‘using personal information gathered in a jailhouse telemarketing operation’ (Hovanyetz 2001).

United Kingdom

The UK has a much more extensive system in place, designed to meet the country’s privacy obligations as a member of the European Union. The Telephone Preference Service (TPS) has been operating in its present form since 1999 (eight years before Australia’s DNC Register), and by 2005 had around eight million numbers registered. The TPS covers voice calls to individuals, while a Corporate TPS allows businesses to avoid unsolicited sales calls. In addition, there is a Mailing Preference Service (for unwanted direct mail), a Baby Mailing Preference Service (for unwanted mail relating to baby products), a Fax Preference Service, and an Email Preference Service. The various services are administered by the UK Direct Marketing Association (an industry body), with oversight from government. Exemptions to the opt-out schemes include market researchers and companies in an existing relationship with the individual being contacted. Significantly, charities and political parties are not exempt. However, recorded messages disseminated through auto-dialers are not covered by the UK system, so telemarketers can continue this practice (Direct Marketing Association 2008; DCITA 2005).

Canada

The Canadian Do Not Call List came into effect in September 2008, although legislation to enact the scheme was passed in 2005. The List is managed by the Canadian Radio-Television and Telecommunications Commission (a government body), and applies only to voice and fax calls to private numbers (not to businesses). A wide range of exemptions apply: charities, newspapers selling subscriptions, political parties and candidates, and companies with whom consumers have an existing commercial relationship. Significantly, the use of auto-dialers by telemarketers is completely prohibited, ‘unless a consumer has consented to be called

by them'. In other words, telemarketing using auto-dialing equipment is essentially an opt-in arrangement in Canada (Canadian Radio-Television and Telecommunications Commission 2008).

India

India's National Do Not Call Registry applies to both private and business numbers. It came into effect in 2007 and is run by the Telecom Regulatory Authority of India. Exemptions to the Registry are quite limited: they include messages of a non-promotional nature relating to financial transactions or arrangements; messages 'relating to charities, national campaigns or natural calamities transmitted on the directions of the Government'; and messages 'in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality' (Telecom Regulatory Authority of India 2008).

3.3 Other policy arrangements

Spam

The *Spam Act 2003* (Cth) prohibits the sending of unsolicited commercial electronic messages, including emails, SMS (text messages), MMS (image messages) and instant messages (but not faxes). A message is 'spam' if it is sent without the receiver's consent, does not contain accurate information about who sent it, or does not include an option to 'unsubscribe' from future messages. Government bodies, political parties, charities, religious organisations and educational institutions are exempt from the Spam Act. ACMA enforces the regulations, and in 2007–08 received 3,757 complaints about spam and issued five infringement notices totalling \$188,100. ACMA also works closely with overseas governments to tackle spam, which is primarily an international phenomenon (AMCA 2008e; ACMA 2008g).

Junk mail

There are no government initiatives to limit the sending of junk mail to households or businesses. The Australian Direct Marketing Association runs an opt-out service for residential addresses, called the Do Not Mail Service. Members of ADMA are expected to refrain from sending junk mail, but the Service 'does not include the removal from lists of companies of which you are a customer' (ADMA 2008). The Distribution Standards Board (DSB), the 'self-regulatory arm' of the Australian Catalogue Association, 'maintains a database of all known addresses that carry a restrictive sign on the letterbox, and provides free of charge a reflective No Advertising Material sticker'. The DSB also 'provides a Hot Line for consumers to report illegal or irresponsible distribution practices' (Australian Catalogue Association 2008). The extent to which consumers are aware of these opportunities is of course questionable.

Australia Post, a wholly government-owned enterprise, encourages the growth of direct mail as a major source of its own income. In its latest annual report, Australia Post boasted that more than half of its domestic letters revenue in 2007–08 was in the 'bulk mail' category, and 'promotional (direct) mail' grew by 9.4 per cent on the previous year (Australia Post 2008b). In fact, it is much cheaper for businesses to send unaddressed letters: they cost as little as \$0.15 per item, compared to \$0.55 for a

standard addressed item (Australia Post 2008a). Australia Post's contribution to limiting junk mail is its commitment not to deliver unaddressed mail to letterboxes bearing the message 'No Unaddressed Advertising Material or similar words' (Australia Post 2008a). However, addressed junk mail can still be delivered to any letterbox, and post office boxes appear to present particular difficulties for those seeking to avoid junk mail.

Face-to-face marketing

Because it is a relatively new phenomenon, there are no coordinated public initiatives designed to deal with face-to-face marketing, apart from regulations governing unfair or dishonest conduct (such as the Trade Practices Act). Some local governments have policies prohibiting street hawking, while others permit such activity. The City of Sydney does not allow it, and if hawkers 'are seen to harass passers-by they need to be reported to Council's Rangers who will speak to them and move them on.'¹⁵ The City of Melbourne, by contrast, 'issues permits for promotional activities. This includes any concept that promotes a product or services but does not include the selling of the product, service or any associated merchandise. Fees are \$1,500 for 4 hours or \$1,700 for more than 4 hours (per location).'¹⁶

Of course, much hawking (or 'promotional activity') takes place in commercially owned spaces, such as shopping centres and airports. The operators of these spaces benefit from the arrangement, since they can charge rent for the 'casual' booths used by hawkers. Our telephone enquiries have revealed that shopping centres charge between \$800 and \$5,000 per week per casual booth, depending on the patronage of the centre in question.

There are some government policies dealing with door-to-door sales, a more traditional form of face-to-face direct marketing. These are largely at the state level; for example, the *Fair Trading Act 1987* (NSW) restricts the hours that door-to-door salespeople can operate and mandates a cooling-off period (Office of Fair Trading 2008). The ACCC also provides guidelines to help consumers deal with door-to-door salespeople and understand their rights under the *Trade Practices Act 1974* (Cth) (ACCC 2008). Under the *Corporations Act 2001* (Cth), it is illegal to sell financial products door-to-door.

3.4 The economic dimensions of direct marketing

According to traditional economic theory, the more information consumers have the better off they will be. Advertising and marketing are regarded as 'information', providing transparent signals about the nature, quality and price of goods and services. But this interpretation of the role of marketing fails to take into account the potential for marketing to impose considerable costs on consumers. According to a report commissioned for Treasury in 2000, *Analysis of Market Circumstances where Industry Self-Regulation is Likely to Be Most and Least Effective*:

Direct marketing offers firms a much more targeted means of promoting their products than advertising. As a result, in theory, it should reduce ... some of

¹⁵ Email correspondence from the City of Sydney.

¹⁶ Email correspondence from the City of Melbourne.

the external costs that the community would have to have borne if the firm had used advertising to promote their product. In practice, however, these potential benefits will be offset by the additional external costs arising from direct marketing (Wallace *et al.* 2000, p. 74).

Such costs included wasted time and energy, difficulty evaluating the claims of suppliers, choice overload, and psychological costs like frustration, irritation and disenchantment. The costs of direct marketing are greater than those of traditional advertising, because direct marketing imposes itself on consumers whether or not they are interested.

Redmond (2005) has an alternative, market-based solution to the problems associated with direct marketing, one that involves the allocation of ‘annoyance rights’ to marketers. In such a system, ‘annoyance’ would be regarded as a kind of pollution (like carbon dioxide) and would form the basis of a trading scheme (like a carbon emissions trading scheme). A cap would then be placed on the total number of telemarketing calls made to members of the public, with a view to bringing down the overall level of unwanted telemarketing calls.

This amount would be allocated among the marketers as their property and collectively establish a limit to the amount of public annoyance. Telemarketers whose superior research, targeting, or technology allow them to more consistently contact interested consumers and not annoy uninterested ones might then sell some of their rights to the less skillful. This type of arrangement would be expected to result in a more efficient allocation of resources (Redmond 2005, p. 16).

As Redmond rightly points out, one of the principle drawbacks of such a scheme is that ‘it institutionalises some level of annoyance as being acceptable or inevitable’ (Redmond 2005, p. 16). He concludes that the level of public nuisance that telemarketing presents is so high that the economically efficient outcome of a trading scheme would be little or no telemarketing. Although Redmond’s suggestions are made in all seriousness, it is unlikely that any government would institute an annoyance trading scheme—even if there were economic benefits to doing so.

A more practical way to make direct marketers absorb the external costs of their activities could be via a levy imposed on direct marketing firms. With contact lists widely available, it is currently very cheap for marketers to buy customer lists and contact them over the phone or by mail. A levy would automatically raise the costs of such activity, thereby reducing the total amount of direct marketing. Funds raised through the levy could then be given to charities in the form of direct government grants—a far more efficient way of fundraising than telemarketing.

4. A new regulatory model

Our survey findings indicate that the Do Not Call Register has been partially successful in reducing unwanted telemarketing calls—by around 30 per cent. Yet because of the wide range of exemptions to the DNC Register, many people continue to receive far more telemarketing calls than they are willing to tolerate. Only a quarter of adult Australians (26 per cent) believe that telemarketing should be permitted, while two in three (64 per cent) believe that it should be banned.

There is also frustration in the community about other forms of direct marketing. Residential letterboxes continue to receive massive amounts of junk mail, even where a ‘no junk mail’ sign is displayed. The increasing use of face-to-face marketing techniques in public spaces, shopping centres and other busy areas is changing the way that we perceive and interact with other people outside of home and work.

To date, policies designed to mitigate the impact of intrusive marketing have relied exclusively on an opt-out approach. In other words, members of the public have to take deliberate action if they wish to avoid direct marketing, for instance by joining the DNC Register. However, our research indicates that an opt-in system would be more effective in reducing the social costs of direct marketing. Such an approach would assume that most people do not wish to receive direct marketing, while still giving everyone the opportunity to do so if they choose.

We therefore propose a new model for controlling and reducing direct marketing and the aggravation it can cause. This would be based on a combination of opt-in and opt-out elements, so that individuals can make more effective decisions about what kinds of marketing approaches they are prepared to accept.

The centrepiece of the new regime would be an *opt-in telemarketing register*. People who would like to receive unsolicited telemarketing calls could register their telephone number with a government body, such as ACMA, and telemarketers would be permitted to call only those numbers on the register. Conversely, people who do not wish to receive telemarketing calls would not be required to take any action. Any organisation calling an unregistered number without express or inferred consent would be subject to penalties.

Currently, a range of organisations are exempt from the rules about unsolicited phone calls, including charities, educational institutions, political parties and candidates, religious organisations, government bodies and organisations which can claim ‘inferred consent through an existing relationship with an individual’. Under the proposed system, these exemptions would still apply, but only to the opt-in register. A *separate opt-out telemarketing register* would allow members of the community to opt out of all unsolicited calls, including those that are currently exempt. Anyone requesting a new telephone number should be explicitly given the option of the joining the opt-out register when they do so.

This system would give each member of the public three options:

- People who want to receive no unsolicited telemarketing calls whatsoever would sign up to the opt-out telemarketing register.

- People who do not want to receive unsolicited telemarketing calls, but are prepared to accept the occasional call from organisations that are exempt (charities, political parties etc) would do nothing.
- People who are happy to receive all unsolicited telemarketing calls would sign up to the opt-in telemarketing register.

In addition to an opt-in/opt-out combination for telemarketing, members of the public should be allowed to signal their desire to opt out of junk mail, unsolicited faxes and door-to-door sales. This could be achieved through a *Do Not Mail Register*, a *Do Not Fax Register*, and a *Do Not Knock Register*, each of which would operate in a similar manner to the current DNC Register. Such a comprehensive approach was originally one of the Australian Government's proposed options for the DNC Register but did not form part of the subsequent legislation.¹⁷ The Do Not Mail Register would apply to unaddressed mail and to addressed mail sent solely for marketing purposes, and repeat offenders would be subject to penalties.

The small business sector has expressed strong concerns about the volume of unsolicited sales calls and junk faxes they receive. A *Business Do Not Call Register* and *Business Do Not Fax Register* would save time and money for those businesses who wish to opt out of unsolicited calls and faxes.

The use of 'robo-calls'—outbound recorded messages—is a source of great frustration. Whereas robo-calls are currently designated as 'voice calls', they are in fact electronic messages sent over a phone line. Classifying such calls as electronic messages (like emails and text messages) would bring them under the Spam Act and effectively make them illegal under Australian law. Likewise, if faxes were to be classified as electronic messages junk faxes would also become unlawful.

The Australian Law Reform Commission recently recommended that 'an organisation that has made direct marketing communications to an individual ... [should], where reasonable and practicable and where requested to do so by the individual, advise the individual of the source from which it acquired the individual's personal information' (ALRC 2008, p. 926). If enacted in legislation, this principle would allow Australians to find out how and by which commercial entities their personal details are being used and sold. Organisations that engage in direct marketing should be required to collect enough information about their contact lists to enable members of the public to understand properly what use is being made of their details. However, given the extent of community frustration, they should be required to do so regardless of whether it is 'reasonable and practicable'.

¹⁷ 'A do not contact register could allow people to express their preference not to be contacted by direct marketers by mail, telephone, door to door or on their mobile phone' (DCITA 2005, p. 9).

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