

Review of the MCCA Direct Marketing Model
Code of Practice

Discussion Paper

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1 INTRODUCTION

Direct marketing has the potential to benefit both consumers and suppliers through increasing choice in shopping behaviour. However, a prerequisite to obtaining these benefits is consumer confidence.

In November 1997, *Direct Marketing: A Model Code of Practice* (the 'Model Code') was released by the Ministerial Council on Consumer Affairs to deal with some of the problems that had been identified in relation to direct marketing.

Adopting the provisions of the Model Code is voluntary for organisations engaged in direct marketing. The Model Code is intended to form a basis for development of specific codes of practice. While the Model Code is not itself enforceable, it fits within a consumer protection safety net comprised of the Trade Practices Act and the various State and Territory Fair Trading Acts.

Following the release of the Model Code, the peak industry body, the Australian Direct Marketing Association (ADMA) agreed to substantially adopt the provisions of the Model Code. ADMA applied for and received Australian Competition and Consumer Commission (ACCC) conditional authorisation for its Direct Marketing Code of Practice (the 'ADMA Code').

The Model Code provides that it is to be reviewed three years after release and at periodic intervals thereafter. The Ministerial Council on Consumer Affairs at its meeting on the 21 July 2000, agreed to commence the review of the Model Code in 2001. At its meeting on the 2 August 2002, the Ministerial Council agreed to commence public consultation on the review.

The objective of this review is to determine the effectiveness of the Direct Marketing Model Code in protecting consumers and ensure its requirements satisfy fair trading and consumer protection needs in a changing regulatory and market environment and to ensure its provisions continue to be relevant.

This paper is designed to provide a policy context and general guidance for interested parties wishing to contribute to the review of the Model Code. The paper poses a number of questions on which comments are sought. However, comments do not have to be limited to those that appear in this paper.

1.1 Structure of discussion paper

This paper has been structured broadly in line with the Council of Australian Governments Principles and Guidelines for National Standard Setting and Regulatory Action (the 'COAG Guidelines').¹

The COAG Guidelines state that potential regulators should identify whether there is a need for action and quantify the potential benefits and costs of that action. The identified costs and

1 The COAG Guidelines are available at <http://www.dpmc.gov.au/pdfs/coagpg.pdf>.

benefits can then be analysed and a conclusion drawn on whether action is necessary and what is the most efficient approach.

While this paper is intended merely to raise issues for discussion and is not, in itself, a proposal for regulatory action, its structure has been adopted so that information can be gathered from stakeholders in a format consistent with the COAG Guidelines.

The first part of this paper provides some background to the development of the Model Code, followed by a discussion generally of the direct marketing industry. The paper then places direct marketing and the Model Code within the current regulatory framework, including both legislation and other self-regulatory initiatives.

The paper then raises some discussion points that may be useful in analysing the potential costs and benefits of various options relevant to this review of the Model Code. Interested parties are not limited to these discussion points only. Comment is sought from interested parties generally on direct marketing and any insights that can be provided will be of great value to this process.

1.2 Terms of Reference

To review the effectiveness of the Direct Marketing Model Code of Practice and report to the Ministerial Council on Consumer Affairs on the following matters:

- The extent to which the Model Code has achieved its objectives of enhancing the potential for consumers to benefit from distance selling and improving the market for reputable businesses;
- Whether the Model Code's objectives remain current and valid in view of changes in the regulatory and technological environment, and the extent to which the Model Code has achieved its objectives;
- What measures could improve the Model Code and ensure it remains relevant.
- The extent to which the Model Code has been adopted by industry.

1.3 Consultation

This review is being conducted by a Working Party comprised of Commonwealth, State and Territory fair trading agencies.

Public consultation on the review of the Model Code will occur by written submissions, targeted focus groups and individual and public meetings (if necessary).

Formal submissions can be lodged electronically (preferred) or in hard copy to the address below.

Postal Address: Review of Direct Marketing Model Code
Consumer Policy Framework Unit
Competition and Consumer Policy Division
Department of the Treasury
Langton Crescent
Canberra ACT 2600

E-mail: directmarketing@treasury.gov.au

Facsimile: 02 6263 3964

Telephone: 02 6263 2028

All submissions will be published on www.consumer.gov.au (subject to claims for confidentiality).

The closing date for submissions is 11 October 2002.

1.4 Discussion Points

Development of the Model Code

1. What has been the impact of the Model Code on direct marketing practices?
2. To what extent have the objectives of the Model Code been achieved?
3. To what extent have industry associations adopted the provisions of the Model Code, and what proportion of direct marketers in the relevant industry sectors do they represent?
4. What approaches have industry associations taken to implement the provisions of the Model Code?
5. To what extent has the adoption of the various provisions of the Model Code impacted on the practices and competitive advantage of ADMA members?

Background

6. Is the definition of direct marketing in the Model Code appropriate?
7. Do you have any information as to the size of the direct marketing industry?
8. What are your experiences with complaints in relation to direct marketing? Do particular types of activity raise more complaints than others? Does direct marketing cause particular problems for certain groups in the community (for example, older consumers, disabled people)?

Regulatory Framework

9. How well do you think the Model Code fits within the current regulatory framework?
10. Is the Model Code effective in supplementing existing law?
11. Should the Model Code play a greater role in clarifying and improving compliance with existing law?
12. Has the Model Code operated flexibly in the changing regulatory and technological environment?
13. What self-regulatory initiatives might influence the Model Code? Is the Model Code consistent with existing self-regulatory regimes?

How the direct marketing industry operates

14. What consumer issues in relation to direct marketing have arisen since the development of the Model Code?
15. Does the Model Code effectively deal with practices that are now emerging, or could emerge, in direct marketing?
16. What effect has the internet had on direct marketing and how does this affect the Model Code?
17. What effect has improved global communication and logistics had on direct marketing and how has this affected the Model Code?
18. Does the Model Code adequately address market failures?

Issues for discussion

Submissions are invited on any issue in relation to the review of the Model Code. Sample issues that may be appropriate for consideration include, but are not limited to:

19. What areas of the Model Code are, or are likely to be, of most benefit to you? What areas of the Model Code are, or are likely to be, of least benefit to you?
20. What areas of the Model Code are, or are likely to be, of most cost to you? What areas of the Model Code are, or are likely to be, of least cost to you?
21. Should any requirements in the Model Code be mandatory? If so, which ones?
22. Is the Model Code consistent with the National Privacy Principles? Are any amendments to the Model Code required to ensure that private information of individuals is protected in line with the National Privacy Principles?
23. Is the Model Code consistent with the E-commerce Best Practice Model? Are any amendments to the Model Code required to deal with the particular characteristics of electronic commerce?
24. How does a code which does not provide complete coverage of the direct marketing industry affect the position for consumers?
25. Should the Model Code address the issue of collection and use of information from publicly available sources, for example, electoral rolls and municipal building approval records?
26. Should the Model Code cover direct marketing material circulated with non-direct marketing material (for example, enclosing advertising with the electricity bill)?
27. Should the current limits on the hours during which direct marketers are permitted to contact consumers remain in the Model Code? If so, should those hours be altered?
28. Should the Model Code require that direct marketers be required to obtain a consumer's consent before sending direct marketing material to that consumer? If so, should consent be express, or should constructive consent be permitted? Should direct marketers be required to update their do-not-call and do-not-mail lists within a specified time limit after receiving a request from a consumer?

2 DEVELOPMENT OF THE MODEL CODE

2.1 Consumer problems leading to development of the Model Code

The Direct Marketing Code was initially drafted in response to consumer concerns with direct marketing. These concerns had been the subject of much debate amongst the Ministerial Council on Consumer Affairs for some years prior to the implementation of the Code.

Direct marketing, and distance selling in particular, has many specific characteristics which cause it to differ from shop front retailing. The consumer's lack of opportunity to inspect goods prior to entering into the purchase contract, the fact that transactions are often initiated by the direct seller without the consumer's consent and that consumers may not have sufficient opportunity to research the goods and services that have been offered are most relevant or compare their quality or performance against similar products.

MCCA identified that consumer problems with direct marketing basically involve three areas:

- fair trading issues, including:
 - information disclosure — for example, consumers may not always have the necessary information to make an informed decision, such as details of the price, payment mechanism, identity of the seller, etc; and
 - cooling off periods — because consumers are unable to inspect a product before purchase when buying goods at a distance from the seller, they need the ability to return unsuitable goods;
- privacy issues, such as concerns about the use of personal information for mailing lists, the inability to prevent such use or to remove personal information from existing lists; and
- telemarketing, such as calling consumers at home at inconvenient times, and the use by telemarketers of silent numbers.

2.2 MCCA Model Code

In July 1993, the Ministerial Council on Consumer Affairs (MCCA) decided a working party should be established to review the sale of mailing lists. The review focussed principally on the practices associated with the compilation and use of lists of personal data and the potential for abuse without appropriate safeguards in place.

Having established appropriate practices, the working party looked at a number of options for ensuring that such practices were adopted. Options ranged from self-regulation and other voluntary and mandatory codes, to industry specific legislation. The working party

envisaged that a code relating to the compilation and use of mailing lists would eventually become part of a comprehensive code setting standards for all direct marketing practices.

At its July 1994 meeting, MCCA directed the Standing Committee of Officials of Consumer Affairs (SCOCA) to identify the emerging issues in direct marketing and suggest appropriate options. Following the release of a discussion paper and submissions received from over fifty organisations, including direct marketers, banks, insurance companies, privacy organisations, charities and government departments and agencies, the SCOCA working group produced a report proposing solutions to some of the consumer problem areas in direct marketing.

The report recommended a Code of Practice be prepared by government, industry and consumers. In August 1995, MCCA directed that a Direct Marketing Code be prepared by a working group chaired by the Australian Competition and Consumer Commission (ACCC) and including industry, consumer and privacy representatives and State and Territory consumer affairs officials.

A draft Code was released for public comment in December 1996. Following the draft code, the final Model Code was released by MCCA in November 1997. The objective of the Model Code is 'to enhance the potential for consumers to benefit from distance selling, and to improve the market for reputable business. It is also intended to prevent unreasonably intrusive forms of marketing by a variety of users of direct marketing techniques including distance sellers and fundraisers'.

The Model Code seeks to achieve its objective by:

- ensuring that consumers have access to the product and service information they need to make informed choices;
- promoting ethical sales practices and ensuring that fair trading principles are complied with;
- ensuring that consumers have access to appropriate returns policies, complaints procedures and remedies where there is a problem with a sale; and
- protecting consumers from unreasonably intrusive telemarketing practices.

2.2.1 Implementation of the Model Code

It was MCCA's intention that the provisions of the Model Code would be picked up by industry associations and implemented through their own codes. As the leading industry association in relation to direct marketing, ADMA has been the most explicit in its implementation of the Model Code. However, the provisions of the Model Code have also been implemented, at least in part, in codes developed by other industry associations.

2.3 ADMA Code

Subsequent to the finalisation of the Model Code, the Australian Direct Marketing Association developed its own code (the 'ADMA Code') based on the provisions in the Model Code.

The ADMA Code applies to ADMA members and all employees, agents and subcontractors of ADMA members. The Code also requires that ADMA members ensure their suppliers become familiar with the code and the compliance obligations of members.

Like the Model Code, the ADMA Code contains a similar statement of objectives. The objectives of the ADMA Code are to:

- ensure customers have access to the product and service information they need to make informed choices;
- minimise the risk of direct marketers breaching the Trade Practices Act or state fair trading legislation;
- promote a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
- increase consumer confidence in doing business with ADMA members.

It is not intended here to describe the provisions of the ADMA Code in great detail. A copy of the ADMA Code can be obtained at www.adma.com.au. However, broadly the ADMA Code is divided into standards of fair conduct (Part B), fair conduct relevant to telemarketing (Part C), fair conduct relevant to electronic commerce (Part D), fair conduct relevant to consumer data protection (Part E) and enforcement (Part F).

While the ADMA Code is based on the Model Code, it does differ in some respects. It draws on various other sources to complement the provisions of the Model Code in respect of areas the Model Code does not address, particularly in relation to electronic commerce and privacy.

2.3.1 Effects on competition of the ADMA Code and ACCC authorisation

Following development of the ADMA Code, ADMA applied to the ACCC for authorisation under section 88(1) to make a contract or arrangement a provision of which would have the purpose of substantially lessening competition.

When determining whether to authorise the Code, the ACCC considered whether the Code's provisions were likely to result in a public benefit and if that benefit outweighed the public detriment of any lessening of competition which followed from giving effect to the Code.

It was agreed that the ADMA Code has the potential for anti-competitive detriment. This anti-competitive detriment arises in the following ways:

- the conduct of ADMA members is restricted beyond that required by law, that is, the Code requirements are prescriptive and have the potential to standardise the way in which participants in the direct marketing industry conduct their business and that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another; and
- the imposition of sanctions (including the revocation of membership of ADMA) where a member is found to be in breach of the Code may mean that the excluded (former) member suffers detriment as a result of potential customers and/or other ADMA

members refusing to deal with a person who is not an ADMA member, and the person being denied access to the advocacy, education and networking activities conducted by ADMA.

However, as to the prescriptiveness of the Code requirements, the ACCC decided that those requirements did not go beyond what is widely accepted as prudent and fair business practices. Direct marketing participants would retain scope to differentiate themselves via their products and the type of technology used to contact potential customers to transact a sale.

The ACCC determined that the Code has the potential to give rise to a number of public benefits in the form of:

- promotion and enhancement of consumer protection by ensuring customers have access to information, respecting privacy, promoting a culture of fair conduct among direct marketers and protecting consumers from false, misleading or unsafe claims;
- ensuring ADMA members put in place appropriate consumer complaint handling procedures;
- promotion of consumer confidence in dealing with direct marketers; and
- consideration of consumer views through the presence of consumer representatives on the Code Authority.

The ACCC ordered a number of amendments to the code submitted by ADMA and, subject to those amendments, the ACCC concluded that the Code is likely to result in a benefit to the public and that the benefit outweighs the detriment to the public by any lessening of competition that is likely to result from giving effect to the Code. Consequently, on 16 August 1999, the ACCC granted authorisation of the ADMA Code. The ACCC authorisation will remain valid until 16 August 2003. A copy of the ACCC authorisation is available at www.accc.gov.au/pubreg/s89_95/1998a.htm.

However, the authorisation is subject to additional conditions that require ADMA to keep its Code up to date with regulatory developments (for example, amendments to the Direct Marketing Model Code, the OECD Guidelines for Consumer Protection in the context of Electronic Commerce, and the National Privacy Principles) on which the ADMA Code is based.

Discussion Points

1. What has been the impact of the Model Code on direct marketing practices?
2. To what extent have the objectives of the Model Code been achieved?
3. To what extent have industry associations adopted the provisions of the Model Code, and what proportion of direct marketers in the relevant industry sectors do they represent?
4. What approaches have industry associations taken to implement the provisions of the Model Code?
5. To what extent has the adoption of the various provisions of the Model Code impacted on the practices and competitive advantage of ADMA members?

3 BACKGROUND

To assist those making submissions to this review, background information concerning the market in which the Model Code has been developed and currently operates is provided below.

3.1 What is direct marketing?

As defined in the Model Code, direct marketing means ‘the marketing of goods or services or the seeking of donations through a means of communication at a distance where:

- consumers are invited to respond using a means of communication at a distance; and
- it is intended that the goods or services be supplied under a contract negotiated through a means of communication at a distance.’

Direct marketing is a highly competitive industry comprising large numbers of firms, both Australian and international, using a wide range of direct marketing techniques to market a wide range of goods and services.

Direct marketing, whether in the form of direct selling, direct mail, telemarketing, direct response advertising or electronic shopping, involves the use of a database of contact details for potential customers. More sophisticated databases can be used, extending beyond merely containing customers’ addresses or telephone numbers and including information on customers’ previous purchases, their preferences and financial and demographic status.

3.2 Size of the market²

The direct marketing industry was examined in detail in 2000 by Tasman Asia Pacific, a consultant to the Taskforce on Industry Self-Regulation. The Tasman Asia Pacific Report is available at www.selfregulation.gov.au/taskforce.asp.

The size of the direct marketing industry is illustrated by the following:

- expenditure on direct marketing in Australia exceeded \$9 billion dollars in 1998 and is currently growing at 15 per cent;
- 550,000 people are employed in direct marketing related activity in Australia;
- loyalty programs have been responsible for a two-thirds increase in the value of credit card transactions since 1995;
- telemarketing is currently growing at a rate of 25 per cent annually and employs 50,000 people;

² Unless otherwise specified, statistics in this section are drawn from the Tasman Asia Pacific Report.

- 1.3 million Australians made purchases using the internet in the year to November 2000 (ABS Cat 8147).

The above figures illustrate that direct marketing is a growing industry.

Further information is sought from participants on the size and growth characteristics of the direct marketing industry. As well as information on the size of the market, information is specifically sought on the nature and extent of problems in the market.

It should be noted that many businesses which engage in direct marketing practices, some on a large scale, in their submissions during the development of the Model Code stated that they do not consider that they are direct marketers. This is particularly the case with, for example, organisations in the finance sector. This points to the importance of defining the scope of the Model Code.

Discussion Points

6. Is the definition of direct marketing in the Model Code appropriate?
7. Do you have any information as to the size of the direct marketing industry?
8. What are your experiences with complaints in relation to direct marketing? Do particular types of activity raise more complaints than others? Does direct marketing cause particular problems for certain groups in the community (for example, older consumers, disabled people)?

4 REGULATORY FRAMEWORK

While the Model Code operates as a self-regulatory system, it sits within a legislative framework. As a self-regulatory system, the Model Code is not intended to replace this legislative framework.

4.1 Trade Practices Act

The Trade Practices Act is the primary legislation regulating consumer protection throughout Australia at the national level.

Part V of the Trade Practices Act contains the consumer protection provisions. In relation to direct marketing, the most important provisions relate to:

- misleading or deceptive conduct;
- false representations about goods or services as to their quality, value, price, availability of facilities for repair, place of origin, warranties, etc;
- offering gifts, prizes or other free items with the intention of not providing them;
- harassment and coercion; and
- asserting a right to payment for unsolicited goods or services, unless the supplier has reasonable cause to believe that there is a right to payment.

The Act also implies non-excludable conditions and warranties into consumer contracts. The implied warranties and conditions include:

- a condition that goods supplied by sample or description will comply with that sample or description;
- warranty that services will be supplied with due care and skill;
- warranty that any goods supplied with services will be fit for the purpose; and
- warranty that, where the purpose is made known, goods or services supplied will be fit for that purpose.

It should be noted that the TPA provides that the ACCC has the power to exempt from legal action certain anti-competitive conduct that may otherwise contravene the Act. This power extends to authorising industry standards which may have an anti-competitive effect, but which are offset by accompanying public benefit.

4.2 State and Territory legislation

All States and Territories have fair trading legislation that substantially mirrors the consumer protection provisions of the Trade Practices Act.

In Victoria, as well as general consumer protection provisions mentioned above, the Fair Trading Act contains specific provisions relating to direct marketing (referred to as 'non-contact sales' in the Act). These provisions impose certain requirements on the seller as to the provision of information to the buyer, for example, the full terms of the agreement, the total consideration to be paid and the name and address of the seller.

It should be noted that Victoria and Queensland are currently in the process of reviewing their Fair Trading Acts. Interested parties may wish to provide input to those processes, as well as this review of the Model Code.

The States and Territories also have other legislation which, while not necessarily applicable to direct marketing, may be relevant guidance in ensuring that a consistent regulatory approach is taken. This is particularly important where a company engages in, for example, door to door selling as well as direct marketing.

All States and Territories have door to door selling legislation. For present purposes, the most significant part of the door to door selling legislation is the cooling off period that applies to purchases. Depending on the particular state or territory, the cooling off period is between 5 and 10 days.

Sale of goods legislation may also be relevant to direct marketing, particularly in relation to implied warranties. For example, goods sold by sample or description must correspond to that sample or description.

4.3 Privacy legislation

As of 21 December 2001, the Privacy Act applies to personal information collected and handled by many private sector organisations in Australia. The legislation establishes a co-regulatory scheme. It sets out a legislative framework for collecting and handling personal information and also contains provision for organisations or industry sectors to develop privacy codes that can operate in place of the legislative framework and be tailored to their own industry needs.

The Privacy Act establishes the National Privacy Principles (set out in Schedule 3 to the Privacy Act) as the minimum privacy standards for the Private Sector. The National Privacy Principles (NPP) regulate the collection, use and disclosure and transfer overseas of personal information. They require organisations to ensure that personal information they hold is accurate up to date and complete, and secure. Organisations are also required to be open about how they manage personal information, provide access and correction rights to individuals, and allow people to deal with them anonymously if that is lawful. The National Privacy Principles also regulate the adoption use and disclosure of Commonwealth Government identifiers.

Of particular interest is NPP 2.1(c), which allows organisations to use non-sensitive personal information for direct marketing where. Among other things, it is impracticable to seek the individual's consent and where the individual is told that they can opt out of receiving any more marketing from the organisation. The Privacy Commissioner has published guidelines which outline circumstances in which it may be impracticable to seek the individual's consent.

The Privacy Act does not apply to a small business operator. A small business is a business with an annual turnover of \$3 million or less. However, the small business exemption does not apply to a small business that is a health service; that trades in personal information; or that provides services under a Commonwealth contract. Small business operators that are not covered by the legislation can choose to opt in if they so wish.

Further information regarding the Privacy Act and the National Privacy Principles can be obtained from the Office of the Federal Privacy Commissioner's website at www.privacy.gov.au, or the Attorney-General's Department's website at www.ag.gov.au/privacy.

4.4 Self-regulation

The Taskforce on Industry Self-Regulation noted that where self-regulation operates within the context of general law, such as the Trade Practices Act and the Fair Trading Acts, then it can add detail and industry specific guidance to help market participants comply with the law and achieve competitive conduct.

4.5 Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business

The Best Practice Model is Australia's implementation of the *OECD Guidelines on Consumer Protection in the Context of Electronic Commerce*.

The Best Practice Model provides voluntary guidance to industry and consumers on the elements of an effective self-regulatory framework in electronic commerce. Adoption of the Best Practice Model will help to ensure that consumers are adequately protected and have confidence in making online transactions.

The Best Practice Model deals with several areas of particular concern to consumers, business and government that need to be addressed in order to build a world class consumer protection environment. These key issues include information, payment, redress, jurisdiction and privacy. Given the substantial degree of overlap between direct marketing and electronic commerce, these key issues may also need to be addressed in this review of the Direct Marketing Model Code.

The Best Practice Model is available at <http://www.ecommerce.treasury.gov.au/publications/BuildingConsumerSovereigntyInElectronicCommerce-ABestPracticeModelForBusiness/index.htm>

4.6 Benchmarks for Industry-based Customer Dispute Resolution Schemes

The Benchmarks provide a set of principles which should form the basis of any effective dispute resolution scheme. The Benchmarks do not have the force of law³ and are intended to be voluntary guidelines, however adherence to them will be a clear demonstration of a commitment to good practice.

The Benchmarks are:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency; and
- effectiveness.

Since a self-regulatory scheme such as the Direct Marketing Model Code should include provision for resolving disputes between businesses and consumers, it is important that the review of the Model Code take into account the Benchmarks.

The Benchmarks are available at <http://www.selfregulation.gov.au/publications/BenchmarksForIndustry-BasedCustomerDisputeResolutionSchemes/index.asp>

4.7 International experience

Other jurisdictions have also addressed the issues raised by direct marketing. Appendix A of this paper outlines the approaches taken by the OECD, the United States and the United Kingdom.

³ However, the Benchmarks have been incorporated into Australian Securities and Investment Commission Policy Statement 139, which is used for interpreting the Financial Services Reform Act. The Benchmarks have also been incorporated into prescribed standards for the approval of complaint handling procedures under a privacy code by the Privacy Commissioner.

Discussion Points

9. How well do you think the Model Code fits within the current regulatory framework?
10. Is the Model Code effective in supplementing existing law?
11. Should the Model Code play a greater role in clarifying and improving compliance with existing law?
12. Has the Model Code operated flexibly in the changing regulatory and technological environment?
13. What self-regulatory initiatives may influence the Model Code? Is the Model Code consistent with existing self-regulatory regimes?

5 HOW THE DIRECT MARKETING INDUSTRY OPERATES

In order to analyse the circumstances in which the Code operates, it is necessary to consider the demand and supply of direct marketing. This involves an analysis of both consumer and supplier perspectives on direct marketing.

5.1 Demand for direct marketing

The demand for direct marketing emanates out of consumer desire for wide choice and easy access. Direct marketing reduces the search costs for consumers in finding suitable goods and services, and also reduces the transaction costs associated with purchasing those goods and services.

However, the quality of information available to consumers may be lacking. For example, it may be difficult for a consumer to determine the actual quality of goods until they have been supplied, it may be difficult for the consumer to determine the full conditions of purchase and payment arrangements they are accepting, and the consumer may not know from whom they are actually purchasing the goods or services.

5.2 Supply of direct marketing

Direct marketing has a number of benefits for firms. It enables firms to avoid the costs of operating a permanent retail establishment and pass this benefit on to consumers. Direct marketing allows firms to tailor their communication to suit a particular product and customer, including personalising communications with potential customers, as well as adopting different marketing strategies in different market segments. Direct marketing also facilitates more immediate and detailed feedback from potential customers.

Some forms of direct marketing may have a poor reputation with consumers, particularly junk mail and telemarketing. Whereas other forms of advertising can be placed in an entertaining context, much direct marketing cannot utilise this advantage. As to cost disadvantages, while direct marketing which utilises data on consumer preferences can be highly effective, the cost of acquiring accurate and useful data may be prohibitive for some firms. Finally, the problems associated with determining the identity of the purchaser is a problem for businesses engaged in direct marketing.

5.3 Impact of new technology and globalisation

New technology has the potential to impact upon the direct marketing industry. For example, the internet has the potential to provide consumers with large amounts of information on product prices, performance and availability, as well as increasing the range of goods and services available to consumers. However, the internet also has the potential to increase the number of new, improved and complex products, as well as the number of suppliers, particularly unknown foreign suppliers.

To some extent linked with the advent of the internet, improved global communication and logistics also has the potential to impact upon direct marketing. For example, increased contact with other countries may make the development of standards more complex since consultation with regulatory authorities in other jurisdictions must be undertaken in order to ensure regulation provides a consistent and effective coverage.

5.4 Nature of market failures

In a perfect market, competitive forces ensure that an efficient outcome is achieved for both consumers and suppliers. However, where factors are present which inhibit these competitive forces, intervention (whether self-regulation, quasi-regulation or government regulation) may be needed. These inhibiting factors are referred to as market failures.

In relation to direct marketing, market failures can arise due to:

- consumers not having access to sufficient information concerning the prices, performance and availability of goods and services to make informed decisions;
- the ability of firms to obscure their true identity, which may provide greater scope for firms to supply lower quality merchandise with little after sales service;
- consumers making purchases under a false name, facilitating fraud on suppliers;
- the adverse effect direct marketing can have on certain social objectives (for example, protecting individual rights to personal privacy and data privacy);
- providing firms with marketing techniques that are much more effective in influencing consumer preferences and coercing consumers to purchase products they would not otherwise have purchased; and
- the public good nature of information provided by some forms of direct marketing (that is, information is freely available to all consumers, however the costs of providing that information are borne only by those consumers who purchase goods or services).

It should be noted that some of these market failures are dealt with by other elements of the regulatory regime. For example, the provision of false or misleading information is prohibited by the Trade Practices Act. Likewise, the issue of privacy protection is addressed in the Privacy Act.

Discussion Points

14. What consumer issues in relation to direct marketing have arisen since the development of the Model Code?
15. Does the Model Code effectively deal with practices that are now emerging, or could emerge, in direct marketing?
16. What effect has the internet had on direct marketing and how does this affect the Model Code?
17. What effect has improved global communication and logistics had on direct marketing and how has this affected the Model Code?
18. Does the Model Code adequately address market failures?

6 ISSUES FOR DISCUSSION

Listed below are some ideas for discussion in the review of the Model Code. The issues listed here are for illustration purposes only and do not purport to cover all issues in relation to direct marketing that may be relevant. Submissions are invited broadly on any issues of relevance and may address other issues not listed here.

6.1 No Code

Withdrawal of the Model Code would mean that the only explicit obligations on the direct marketing industry would be the obligations contained in the current legislative regime, such as the Trade Practices Act, the Fair Trading Acts and the Privacy Act. In addition, the ADMA Code would continue to apply, but its provisions would not be linked to the Model Code.

Withdrawal of the Model Code may be appropriate for those sectors which are already regulated, such as banking and insurance. However, there will be some aspects of direct marketing which are not covered by those codes simply because they were not in contemplation at the time those codes were drafted.

It may be thought that direct marketing is not an industry but is merely a technique used by various businesses across various industries for communicating with customers. In many cases, direct marketing is not part of the core activities of the business. It may, therefore, be unnecessary for there to be a direct marketing code, as those industries which use direct marketing techniques should be responsible for incorporating rules about direct marketing into their own regulatory regime.

Withdrawal of the Model Code may impose costs on business in developing a code of practice without guidance from the Model Code, for example, costs for research or consultation. While it would be difficult to quantify or measure, businesses may also suffer because of a lack of consumer confidence in direct marketing if there is no code of practice.

However, withdrawal of the Model Code may benefit business through greater flexibility. This will be the case whether business proceeds with no code, or utilises the greater flexibility in independently drafting a code of practice. This may also help to eliminate any inconsistencies between a direct marketing code and any other applicable codes.

Costs to consumers may arise if the code developed by industry does not provide appropriate protection. Consumers may experience a lack of confidence in direct marketing if there is no code or a code developed by industry without appropriate consumer input.

6.2 Retain Model Code with minor amendments

6.2.1 Code enhancement in relation to privacy

The business environment in relation to privacy has changed significantly since the Model Code was drafted. As mentioned above, amendments have been made to the Privacy Act which extend privacy protection to the private sector.

Technology for storing and retrieving personal information has also improved since the Model Code was drafted. It may be appropriate therefore to consider the issue of collection and use of information from publicly available databases, such as electoral rolls and municipal building approval records.

However, it should be noted that Australia regulates privacy issues separately from consumer protection issues. There is separate legislation and different enforcement agencies with specialised experience. Consequently, it may be desirable **not** to include privacy provisions within the Model Code, because the Privacy Commissioner is responsible for approving privacy codes for industry. It may, however, be appropriate to make reference in the Model Code to the need for a privacy statement.

While businesses will in any event be required to comply with the privacy legislation, they may benefit from the extra guidance provided by the inclusion of additional provisions in the Model Code, as it may simplify development of an industry code. However, as privacy is already dealt with to some extent in the ADMA Code, there may be costs to business if any enhancements to the Model Code differ from the provisions currently in the ADMA Code, as this will necessitate changes to the practices and procedures for business.

Consumers may benefit from the inclusion of privacy provisions in the Model Code through increased awareness of their rights. However, it will be necessary to ensure that any privacy provisions introduced to the Model Code adequately protect consumers.

Note that approval must be given by the Privacy Commissioner if it is desired that the privacy provisions in the Model Code or the ADMA Code are to take effect as a privacy code under the Privacy Act.

6.2.2 Code enhancement in relation to electronic commerce

Substantial technological advancements have occurred since the Model Code was drafted. With regard to electronic commerce, there is no doubt that future technologies will significantly impact on the practice of direct marketing. In particular, the relative ease and low cost of sending bulk e-mail may dramatically alter direct marketing practices.

Since the Model Code was drafted, the Best Practice Model for Electronic Commerce has been introduced. The Best Practice Model provides that businesses should not send commercial e-mail except to people with whom they have an existing relationship or to people who have already said they want to receive commercial e-mail.

It will be important to address electronic commerce issues in reviewing the Model Code. However, comment is invited on whether these aspects should be incorporated into the Model Code, or whether they are better left in the Best Practice Model.

Since, as mentioned above, technological developments will impact on direct marketing, business may benefit from the extra guidance provided by the inclusion of electronic commerce provisions in the Model Code, as it may simplify development of an industry code. However, as electronic commerce is already dealt with in the ADMA Code, there may be costs to business if any enhancements to the Model Code differ from the provisions currently in the ADMA Code, as this will necessitate changes to the practices and procedures for business.

It will also be important to ensure that the inclusion of electronic commerce provisions does not stifle innovation amongst businesses in the development of policies and procedures in these areas.

If it is decided to introduce electronic commerce provisions to the Model Code, it will be important to ensure that the amended Model Code adequately sets out the respective rights and obligations of business and consumers.

6.2.3 Other minor amendment in response to changing consumer needs

Stakeholders may like to consider whether the Model Code adequately protects the interests of consumers. Issues for discussion might include, for example, the length of the cooling-off period (cl.31) or the permissible hours of calling (cl.56).

If the Model Code is amended, it will be important to ensure that, while greater emphasis is placed on consumer wants and needs, a fair balance is also maintained with the legitimate commercial interests of business. This will ensure that the Model Code retains the support of business. An unsupported Model Code raises significant problems in relation to compliance. Good levels of compliance are essential in making the Model Code effective. Also, it will be important to ensure that an amended Model Code does not stifle innovation amongst business in the development of consumer protection policies.

There may be benefits to business if the increased consumer protection provisions in the Model Code encourage consumer confidence in direct marketing. Also, governments may benefit if the improved consumer protection provisions of the Model Code result in reduced access to other government services.

6.3 Sectoral sub-codes

As noted earlier, direct marketing encompasses a wide range of marketing techniques which are used to sell a wide range of goods and services. For this reason, a series of sectoral sub-codes, either on a product basis (for example, banking sub-code, books and magazines sub-code, fundraising and charities sub-code) or on a technique basis (for example, direct mail sub-code, telemarketing sub-code, market research sub-code) may be better than a single code encompassing the entire direct marketing industry.

Sectoral sub-codes will benefit business by allowing the sub-codes to be better tailored to meet specific circumstances in each sector. This may reduce compliance costs since businesses will only be required to comply with those provisions, which affect their particular business. Improved compliance may also provide benefits to business through increased consumer confidence.

However, business may incur extra costs if the business operates across a number of sectors and is required to comply with several different sub-codes. Costs will be incurred in adopting different work practices in different sectors, as well as incurring costs through a reduction in flexibility to deal with issues that may arise across different sectors.

Reduced compliance costs for business should improve compliance, thus benefiting consumers. However, where there are differences in the content of sectoral sub-codes, costs to consumers may be incurred if consumers are faced with different conditions in the various sectors.

On the other hand, sectoral sub-codes may infuse the various sectors with greater 'ownership' of their code and thus improve compliance. Improved compliance by business may reduce reliance on other government services, such as the court system.

6.4 Mandatory code

A mandatory code is a code of practice the provisions of which are enforceable by government through the application of sanctions to offending individuals or companies. A mandatory code would be underpinned by legislation in the Trade Practices Act and State Fair Trading Acts.

It would be expected that some would argue that a mandatory code will require an increase in monitoring and enforcement costs for governments. However, this could be mitigated by a greater reduction in complaints and less demand on government dispute resolution services.

If a mandatory code is significantly more onerous than a voluntary code, then compliance costs for business could be greater. Both mandatory and voluntary codes may stifle innovation if their provisions are too prescriptive and do not keep up with an evolving marketplace. Any increased costs borne by business would be likely to be passed on to consumers as higher prices.

An effective voluntary code depends upon an industry code authority being well resourced and having effective, efficient and impartial dispute resolution, compliance, reporting and review functions. With a mandatory code, the administrative costs are usually shared between industry and government and the costs for industry associated with code compliance are borne by all participants in an industry sector, instead of just voluntary code subscribers.

Others could argue that while a mandatory code may involve increased costs for stakeholders, there may be an increase in consumer confidence flowing from the stricter controls on business processes in relation to direct marketing. Where there is a need for regulatory intervention, it is important to determine an appropriate balance between fair trading and consumer protection measures and the economic interests of business as well as whether there is a need for wider compliance.

6.5 Status quo

Finally, comment is sought from interested parties on the option of maintaining the status quo. This would involve no change to the current system. That is, the Model Code, and subsequently the ADMA Code also, remains unchanged.

Discussion Points

Submissions are invited on any issue in relation to the review of the Model Code. Sample issues that may be appropriate for consideration include, but are not limited to:

19. What areas of the Model Code are, or are likely to be, of most benefit to you? What areas of the Model Code are, or are likely to be, of least benefit to you?
20. What areas of the Model Code are, or are likely to be, of most cost to you? What areas of the Model Code are, or are likely to be, of least cost to you?
21. Should any requirements in the Model Code be mandatory? If so, which ones?
22. Is the Model Code consistent with the National Privacy Principles? Are any amendments to the Model Code required to ensure that private information of individuals is protected in line with the National Privacy Principles?
23. Is the Model Code consistent with the E-commerce Best Practice Model? Are any amendments to the Model Code required to deal with the particular characteristics of electronic commerce?
24. How does a code, which does not provide complete coverage of the direct marketing industry, affect the position for consumers?
25. Should the Model Code address the issue of collection and use of information from publicly available sources, for example, electoral rolls and municipal building approval records?
26. Should the Model Code cover direct marketing material circulated with non-direct marketing material (for example, enclosing advertising with the electricity bill)?
27. Should the current limits on the hours during which direct marketers are permitted to contact consumers remain in the Model Code? If so, should those hours be altered?
28. Should the Model Code require that direct marketers be required to obtain a consumer's consent before sending direct marketing material to that consumer? If so, should consent be express, or should constructive consent be permitted? Should direct marketers be required to update their do-not-call and do-not-mail lists within a specified time limit after receiving a request from a consumer?

7 APPENDIX A – INTERNATIONAL EXPERIENCE

It is important to note that some direct marketers operate internationally, as well as in Australia. Therefore, it is important that the regulatory approach taken in Australia conforms, as far as possible, with regulatory standards applying in other countries where these companies also operate.

Set out below is a brief summary of work undertaken in selected other jurisdictions on direct marketing.

7.1 *OECD Guidelines On Consumer Protection In The Context Of Electronic Commerce*

The OECD Guidelines were promulgated on 9 December 1999. They are designed to help ensure that consumers are no less protected when shopping online than when they buy from their local store or order from a catalogue. By setting out the core characteristics of effective consumer protection for online business to consumer transactions, the OECD Guidelines are intended to help eliminate some of the uncertainty that both consumers and businesses encounter when buying and selling online.

The OECD Guidelines are not mandatory, but were developed to facilitate regulation by member nations. Within Australia, the OECD Guidelines have been substantially implemented through the E-commerce Best Practice Model.

7.2 United States

In addition to enforcing US fair trading legislation, the Federal Trade Commission (FTC) has taken various steps to regulate direct marketing. The FTC has promulgated the Mail or Telephone Order Merchandise Rule and the Telemarketing Sales Rule. These Rules take the form of subordinate legislation. Further information can be obtained from the FTC at www.ftc.gov.

7.2.1 Mail or Telephone Order Merchandise Rule

7.2.1.1 Scope

The Mail or Telephone Order Merchandise Rule applies to sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment or the method used to solicit the order. Telephone order merchandise includes both direct and indirect use of the telephone, including fax machines and computers.

However, the provisions of the Rule do not apply to subscriptions ordered for serial delivery after the initial shipment has been made (for example, magazine subscriptions) or orders made on a collect-on-delivery basis. Also, where the merchandise is shipped together with an invoice which is payable on receipt, this is not covered by the Rule.

Importantly, the Rule only applies to merchandise and does not apply to services.

Penalties for breaking the Rule include fines of up to US\$10,000 per violation, in addition to any damages payable to consumers.

7.2.1.2 Delivery and delays

The Rule imposes obligations in relation to delivery of merchandise within specified time limits. When a seller advertises mail or telephone order merchandise, the seller must have a reasonable basis for stating it can deliver within the time specified by the seller. If the seller does not specify a time in the advertisement, the seller must have a reasonable basis for believing it can ship within 30 days.

If the seller cannot deliver within the applicable time (whether specifically stated or 30 days) the seller must seek the buyer's consent to the delay. If the buyer does not consent, the buyer is entitled to a refund.

When notifying the buyer of a delay, the seller must provide the buyer with a revised delivery date (or, if unknown, a statement that the seller is unable to provide a revised delivery date, together with the reasons for the delay), a statement that the buyer may cancel the order and obtain a full and prompt refund, and a means for the buyer to cancel the order at the seller's expense (for example, reply paid envelope or toll free telephone number).

7.2.1.3 Unordered goods

It is unlawful for the seller to send any merchandise without the express request of the recipient, or try to obtain payment for or the return of unordered merchandise. Consumers who receive unordered merchandise are legally entitled to treat the merchandise as a gift.

7.2.2 Telemarketing Sales Rule

7.2.2.1 Scope

The Telemarketing Sales Rule was adopted by the FTC under the Telemarketing and Consumer Fraud and Abuse Prevention Act. Telemarketing is defined as a plan, program or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. It does not include the solicitation of sales through the mailing of a catalogue where the seller receives telephone calls initiated by customers in response to that catalogue.

The Rule does not apply to banks, common carriers (for example, long distance telephone companies and airlines), non-profit organisations or insurance companies.

The Rule extends beyond sellers and telemarketers in making it a violation of the Rule for anyone to substantially assist a seller or telemarketer if that person knows or consciously avoids knowing that the seller or telemarketer is violating the Rule. This applies, for example, to a third party that provides sellers or telemarketers with mailing lists or assistance in creating sales scripts.

Violations of the Rule are subject to civil penalties of up to US\$10,000 per violation, in addition to injunctive relief and damages.

7.2.2.2 Information about the goods or services

The Rule requires a seller or telemarketer to provide certain material information to a consumer before the consumer pays for the goods or services. Material information is information that a consumer needs to make an informed purchasing decision. Information may be provided either orally or in writing, however the information must be clear and conspicuous. The Rule specifies four broad categories of material information:

- cost and quantity;
- material restrictions, limitations or conditions;
- no-refund policy; and
- prize promotions.

7.2.2.3 Information about the seller

In outbound telemarketing calls, the Rule requires the telemarketer to promptly disclose:

- the identity of the seller;
- that the purpose of the call is to sell goods or services;
- the nature of the offered goods or services; and
- in the case of a prize promotion, that no purchase or payment is necessary to participate or win.

'Promptly' is not defined in the Rule, however at a minimum it requires that the information be provided before any sales pitch is given. Where a particular call has multiple purposes (for example, the sale of goods or services along with some other objective, such as market research or determining customer satisfaction) the identification disclosures listed above must be made promptly during the first part of the call, before the non-sales portion of the call takes place. If the seller has no plans to sell goods or services during a call (for example, the call is merely to welcome a new customer), the seller is not required to make the disclosures, even if at some point during the call the customer asks about other goods or services offered by the seller and the seller responds by describing those goods or services.

7.2.2.4 False or misleading statements

The Rule prohibits a seller or telemarketer from expressly or impliedly making any false or misleading statement to induce anyone to pay for goods or services. In addition to the general prohibition, the Rule prohibits seller from misrepresenting certain specific categories of information about a transaction that are likely to affect a consumer's purchasing decision regarding the goods or services offered. The seven categories of information that must not be misrepresented are:

- cost and quantity;
- material restrictions, limitations or conditions;
- performance, efficacy or central characteristics;

- refund, repurchase or cancellation policies;
- material aspects of prize promotions;
- material aspects of investment opportunities; and
- affiliations or endorsements.

7.2.2.5 Abusive practices

The Rule prohibits a seller or telemarketer from engaging in abusive conduct, including threats, intimidation or the use of profane or obscene language.

The Rule imposes calling restrictions on telemarketers. These restrictions prohibit calling consumers repeatedly with the intent to annoy, abuse or harass the consumer, calling any consumer who has previously requested that he or she not be called, and calling any consumer's residence before 8.00am or after 9.00pm local time at the consumer's location.

The Rule requires verifiable authorisation for use of a consumer's bank account information to obtain payment. The requirement for verifiable authorisation can be satisfied by advance written authorisation from the consumer, a tape recording of the consumer giving oral authorisation, or by a written confirmation sent to the consumer prior to the submission of a draft for payment.

7.2.2.6 Records

The Rule requires sellers and telemarketers to keep records relating to their telemarketing activities. The records must be maintained for two years. The following records must be kept:

- advertising and promotional materials;
- information about prize recipients;
- sales records, including the name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;
- employee records; and
- verifiable authorisations for demand drafts.

7.3 United Kingdom

The Consumer Protection (Distance Selling) Regulations 2000 transpose into UK law the European Directive 97/7/EC on the protection of consumers in respect of distance contracts. The Regulations are available at www.hmso.gov.uk/si/si2000/20002334.htm. The Directive is available at http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0067.html.

7.3.1.1 Scope

The Regulations apply to contracts for goods and services to be supplied to a consumer where the contract is made exclusively by means of distance communication, that is any means used without the simultaneous physical presence of the consumer and the supplier. The Regulations do not apply to contracts relating to the supply of financial services, and have limited application to contracts for the regular delivery of goods intended for everyday consumption (for example, daily milk deliveries) and contracts for the provision of accommodation, transport, catering or leisure services.

A contract can be made in a number of different ways, including completion by the consumer of a clip-out coupon in a newspaper advertisement, during a telephone conversation or by use of an interactive web site.

The Regulations only apply to contracts concluded in the context of organised distance sales or service provision schemes. It will not apply if a business does not usually sell goods or services by distance, but agrees to do so in response to a one-off request from a consumer over the telephone.

7.3.1.2 Information about the goods or services

The supplier must provide clear and comprehensible information to enable the consumer to decide whether to buy. This information must include:

- the supplier's name and, if payment is required in advance, the supplier's address;
- a description of the goods or services;
- the price, including all taxes;
- delivery costs (if applicable);
- arrangements for payment and for delivery of goods or performance of services (if no date is specified delivery of goods or the start of performance of a service must be within 30 days of the order);
- the right to a cooling off period, and whether return of the goods will be at the expense of the supplier or consumer;
- if the consumer is to use a premium rate telephone number the cost of the call must be specified;
- how long the offer or price remains valid;
- the minimum duration of the contract in the case of a contract to supply goods or services continuously (for example, mobile phone) or recurrently (for example, a monthly book club); and
- if the supplier wants to be able to offer substitute goods or services if those ordered are no longer available, the consumer must be told of this in advance and informed that in this case the cost of returning substitute goods would be borne by the supplier.

If a business cold calls consumers by telephone with a view to concluding a distance contract, the caller must clearly identify the business and the commercial purpose of the call at the beginning of the conversation.

After conclusion of the contract the seller must send to the consumer confirmation in writing of the main items of information (that is, supplier's name, description of goods, price, delivery arrangements, cooling off period). The confirmation must be provided at the latest by the time that the goods are delivered or, in the case of services, before or at an early stage during the performance of the contract.

In addition to the information mentioned above, the confirmation should include details about when and how the consumer can exercise the right to cancel, a physical address for the supplier (not a post office box number) and details of any after-sale service.

7.3.1.3 Cooling off period

The Regulations provide a cooling off period and an unconditional right to cancel during that period. However, the right to cancel does not apply to services that begin before the end of the cooling off period, the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier, goods made to the consumer's specifications, perishable goods, the supply of audio or video recordings or computer software if they are unsealed by the consumer, the supply of newspapers, periodicals or magazines, and gaming, betting or lotteries.

The cooling off period begins as soon as the order has been made and ends, in the case of services, seven working days after the order was made or, in the case of goods, seven working days after receipt of the goods. If the supplier has not complied with the requirement for written confirmation, the cooling off period can be extended for up to three months.

The Regulations require the consumer to send a notice of cancellation in writing. The effective date of cancellation is that date on which the notice is sent.

When a consumer cancels an order, all money paid must be returned within 30 days. Charging for delivery and recovery in the event of cancellation are commercial decisions for the business and will be a factor in a consumer's choice between competing suppliers.

When a consumer exercises the right to cancel under the cooling off provisions, ownership of the goods will revert to the supplier. The consumer is required to take reasonable care of any goods that have been supplied.

7.3.1.4 Fraud and consumer confidence

With regard to unsolicited goods, the consumer has the right to retain or dispose of unsolicited goods as if they were an unconditional gift. It is an offence to demand payment from consumers in respect of unsolicited goods or services.

Suppliers are not able to contract out of the Regulations by inserting contractual provisions inconsistent with the Regulations.