

Mr Geoff Leveritt  
Review of the Direct Marketing Model Code  
Consumer Policy Framework Unit  
Competition and Consumer Policy Division  
Department of the Treasury  
Langton Crescent  
Canberra ACT 2600

Dear Mr Leveritt,

### **Review of the MCCA Direct Marketing Model Code of Practice**

ADMA welcomes the opportunity to comment on the Discussion Paper relating to the Review of the MCCA Direct Marketing Model Code of Practice. ADMA is Australia's principal industry body for data-driven marketing. Formed in 1966, ADMA has evolved to become the nation's pre-eminent marketing association representing over 500 member organisations. A national non-profit organisation based in Sydney, ADMA has State Branches in New South Wales, Queensland, South Australia, Victoria and Western Australia.

Membership of ADMA comprises both organisations that market their products and services using direct marketing techniques and suppliers of those services who provide technical and creative support.

ADMA strives to create an environment that encourages the growth of responsible direct marketing in Australia. To this end, the Association developed a Code of Practice in consultation with the Ministerial Council of Consumer Affairs (MCCA), the Australian Competition and Consumer Commission (ACCC), consumer and business groups, and established the independent Code Authority to monitor compliance with this Code. ADMA, through the Code Authority, offers consumers recourse in cases where they have not been able to resolve their complaint directly with the organisation. The Code Authority is comprised of equal numbers of industry and consumer representatives and is chaired by an individual from outside the direct marketing industry. Should the Authority find a breach of the Code of Practice by an ADMA member it is authorised by the ACCC to impose a variety of sanctions. These are outlined in the enclosed Code Authority Annual Report.

Having carefully considered the issues for discussion we would like to comment as follows:

**1. What has been the impact of the Model Code on direct marketing practices?**

The Model Code has had the greatest possible positive impact on direct marketing practices. This is largely the result of ADMA adopting the Model Code in its entirety and incorporating the provisions into the ADMA Code of Practice. In this way, the standards outlined in the Model Code are subscribed and adhered to by all ADMA members, which amounts to companies responsible for over 80 per cent of the \$16.2 billion annual direct marketing spend in Australia. Looked at another way, the adoption of the Model Code has reduced consumer complaints about distance selling from a perceived potential systemic problem to minimal and manageable proportions.

**2. To what extent have the objectives of the Model Code been achieved?**

Since 1997 direct marketing has grown two and a half times, and the trend is continuing upwards. The number of complaints received by the ADMA Code Authority has not risen in line with this growth (see enclosed Annual reports). This suggests that the objectives of the Code are being achieved in terms of ethical sales practices and consumer redress.

In relation to telemarketing, the issue of intrusive cold calling practices has seen a notable reduction as the less-reputable businesses have turned to the lower-cost methods of marketing. In addition, it is important to recognise that many 'so-called' telemarketing complaints are in fact generated by market researchers, who are not covered by the Model Code.

ADMA believes that the Model Code has enhanced the potential for consumers to benefit from distance selling by ensuring customers have access to the product and service information they need to make informed choices. This is evidenced through significant industry growth and increased consumer purchasing activity. This has been achieved through the Model Code maintaining a balanced approach that recognises the needs of both business and the consumer by avoiding over prescriptive restriction.

**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?**

According to the most recent industry research by CEASA, direct marketing was responsible for expenditure of the \$16.4 billion in 2001. This consisted of call centres and telemarketing (61%), catalogues (9%), direct mail (8%), exhibitions (8%), classified directories (6%), Internet (5%) and other (3%). ADMA estimates that its 500 members account for 80% of that expenditure.

**4. What approaches have industry associations taken to implement the provisions of the Model Code?**

ADMA has incorporated the provisions of the Model Code within its own Code of Practice and takes all necessary steps to ensure member companies comply with the Code provisions.

In 1998, the ADMA Code Authority was established to oversee compliance with the Code of practice and to ensure consumer recourse in cases where they have not been able to resolve their complaint directly with the company concerned. The Code Authority has appropriate consumer representation in accordance with the Model Code for complaint handling. In addition, ACCC authorisation has been obtained to ensure otherwise anti-competitive practices such as imposing sanctions against non-compliant members, can be utilised.

Distinct from the Code Authority, ADMA has undertaken regular initiatives - the most recent in July 2002 - to encourage members to highlight that they are 'Code Compliant'.

**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?**

Since CEASA began collecting statistics, direct marketing spending has grown from \$5 billion in 1995 to \$16.4 billion in 2001. The figures represent both organic growth and a marked shift from mainstream media to direct marketing techniques. ADMA contends that the high standards promoted through the Code and adopted by ADMA members has been a key factor in generating consumer confidence in direct marketing. The high level of Code Compliance and take up of 'Code Compliant' advertising among members who communicate directly with consumers is evidence that adherence to the Code promotes consumer satisfaction and customer loyalty, both of which are beneficial from a business perspective.

## **Background**

**6. Is the definition of direct marketing in the Model Code appropriate?**

ADMA does not believe that 'direct selling' should be included in the definition of direct marketing. Direct selling is generally understood to refer to door-to-door selling which is covered by specific legislation on a State by State basis. ADMA refers to itself as Australia's peak body for data-driven marketing reflecting that the focus of direct marketing is the use of data, strategy and information technology.

**7. Do you have any information as to the size of the direct marketing industry?**

See answer 3. It should be pointed out that the Internet has not developed as anticipated. CEASA recorded a drop of 23% in spending on Internet related activities between 2000 and 2001. This should be taken into account when considering the Tasman Asia Pacific research undertaken in 2000 quoted in the Issues Paper. Internet and e-commerce generally have become another direct marketing tool not a stand-alone technique or industry sector.

**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)?**

See enclosed ADMA Code Authority Annual Reports

## **Regulatory Framework**

**9. How well do you think the Model Code fits within the current regulatory framework?**

The Model Code continues to fit surprisingly well within the current regulatory framework, particularly when it is considered that its provisions have almost entirely been overtaken by legislation in the case of privacy and financial services and co-regulation in the case of enforceable ACIF and ASIC codes.

**10. Is the Model Code effective in supplementing existing law?**

In ADMA's view the Model Code complements rather than supplements existing law. The circumstances differ with regard to the specific case of telemarketing. In this area there is an abundance of conflicting State legislation, much of which directly contradicts Federal legislation, such as the Financial Services Reform Act 2000. In this area, the Model Code plays an important role in clarifying existing law. To this end, ADMA is concerned to ensure the Model Code maintains this role by avoiding the introduction of additional or contradictory criteria that will cause further industry confusion and uncertainty.

**11. Should the Model Code play a greater role in clarifying and improving compliance with existing law?**

The Model Code has played an effective role in clarifying and improving compliance with existing law whilst maintaining a balance between the interests of business and needs of the consumer. In ADMA's view, the Code should continue this role.

**12. Has the Model Code operated flexibly in the changing regulatory and technological environment?**

No. The Model Code is not currently a flexible instrument. This is mainly due to the requirement that alterations or amendments to the Code require consideration by a Ministerial Council, which meets infrequently. When reviewing the Model Code, it should be taken in to account that greater flexibility is required in order to remain consistent with legislative and technological changes. The ADMA Code of Practice is also subject to similar conditions due to authorisation requirements laid down by the ACCC. This has not prevented ADMA developing best practice guidelines in developing areas of business activity (E-commerce) or consumer sensitivity (sweepstakes) to assist industry and maintain high standards of practice.

**13. What self-regulatory initiatives might influence the Model Code? Is the Model Code consistent with existing self-regulatory regimes?**

No comment

## **How the direct marketing industry operates**

### **14. What consumer issues in relation to direct marketing have arisen since the development of the Model Code?**

The development and implementation of privacy legislation, in particular the National Privacy Principles which relate to the private sector, has dominated policy consideration since the Model Code was approved. The National Privacy Principles now set the standard for Fair Conduct Relevant to Consumer Data Protection and should take precedence over other privacy related parts of the Model Code such as telemarketing and electronic commerce.

### **15. Does the Model Code effectively deal with practices that are now emerging, or could emerge, in direct marketing?**

It is ADMA's view that the Model Code should be as technologically neutral and generic as possible. This will allow the Code to remain relevant and applicable to new emerging technologies and marketing techniques, for example SMS, 3G and interactive television.

### **16. What effect has the Internet had on direct marketing and how does this affect the Model Code?**

Although expected to develop as a stand-alone medium, the Internet has become just another facilitating tool available to direct marketers. E-mail, however, is extensively used particularly by financial institutions for business-to-business and business-to-customer communications. It is recognised that spam is a concern, however, it has been identified by the National Office of the Information Economy (NOIE) that the major source of the spam problem stems from international and disreputable organisations. Such organisations are often outside the legal jurisdiction, or disregardful of existing laws that protects the consumer against the receipt of spam. The issue was addressed in comprehensive research undertaken by NOIE, which proposed a number of solutions to the problem. It is ADMA's view that the Model Code should be comprehensive enough to incorporate the sorts of solutions proposed by NOIE (also taking into account solutions offered by international bodies) without impeding the existing uses of the electronic technologies which are already being extensively utilised by reputable and consumer-conscious companies.

### **17. What effect has improved global communication and logistics had on direct marketing and how has this affected the Model Code?**

The major change has been the ability to process increasing amounts of personal data. Consumer and privacy concerns have been addressed by National Privacy Principles, which are subject to review after two years.

### **18. Does the Model Code adequately address market failures?**

The Model Code was introduced before there was real evidence of market failure. ADMA maintains that there is still no case of market failure to be made. Regulatory instruments are tailored to suit a need, therefore if there was systemic market failure then a more interventionist position by the appropriate regulatory authorities would

be suitable.

### **Issues for discussion**

- 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?**

In ADMA's case the Code as a whole is of benefit.

- 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?**

ADMA members will incur costs if the Model Code introduces provisions which depart markedly from existing Commonwealth, State or Territory law or regulation. For instance, a change to the cooling-off period provisions would cause members to reprint documentation, change website, alter instructions to outsourced mail and fulfilment houses etc.

In addition, the enforcement mechanisms put in place with the establishment of the Code Authority are at significant cost to ADMA.

- 21. Should any requirements in the Model Code be mandatory? If so, which ones?**

As stated previously, many of the Model Code provisions are now covered by legislation or regulation - this negates the need to make the Code, or any part of it, mandatory. For instance, in 2001 an issue concerning direct response television proved to be within the scope of existing Fair Trading legislation.

In addition, making specific provisions of the Model Code mandatory will cause confusion due to the blurred distinction between Codes of Practice and legislation. This is not to the benefit of either the consumer or industry.

- 22. 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? 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?**

ADMA strongly asserts that the Model Code should **not** address the issue of collection and use of information from publicly available sources. It is essential that the Model Code accurately reflects the Privacy Act and the National Privacy Principles. As neither the Privacy Act nor the NPPs differentiate in their application dependant upon the source of the personal information (i.e. no distinction is drawn between data derived from a private or a public data source) the Privacy Act and the NPPs apply uniformly and systematically to all personal information without distinguishing between data types or data sources. For MCCA to introduce such a distinction as part of the Model Code would effectively amount to an alteration of current legislation. This is clearly beyond MCCA's remit.

It is essential that the Model Code exactly replicate the NPP provisions. This would require the provisions to be included within the Model Code without alteration. ADMA also believes it is necessary to provide a mechanism through which legislative amendments can be quickly and easily incorporated into the Model Code.

**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?**

The section of the ADMA Code dealing with 'Fair Conduct Relevant to Electronic Commerce' and the E-commerce Best Practice Guidelines contain provisions that duplicate privacy legislation and other parts of the ADMA Code of Practice. It is ADMA's recommendation that the Model Code should contain only generic principles applicable to all technologies (technology neutral).

Adopting a generic approach will facilitate sectors that wish to use the Model Code as a basis for developing industry or medium specific Codes or Guidelines. In this way the Model Code will set the benchmark that needs to be achieved by all direct marketing sectors regardless of medium. ADMA has an additional reason for recommending flexibility. The ACCC authorisation rules only allow for minor changes to an authorised code without lengthy and expensive amendment. Adopting generic provisions will ensure the ADMA Code Authority and Fair Trading Ministers are able to use the Model Code provisions to regulate the use of emerging technologies without the need of amendment.

**25. How does a code which does not provide complete coverage of the direct marketing industry affect the position for consumers?**

Direct marketing is a discipline rather than an industry. Anyone with a computer and a list of names can become a direct marketer. However ADMA has taken a number of measures to broaden coverage of the Model Code beyond its membership. Non-members are eligible to participate in the mail, telephone and e-mail preference schemes, members are encouraged to bind non-members such as suppliers to the Code provisions under contractual arrangements and the Code Authority is empowered to consider complaints about non-members.

**26. Should the Model Code cover direct marketing material circulated with non-direct marketing material (for example, enclosing advertising with the electricity bill)?**

No. This matter is clearly covered in the Office of the Federal Privacy Commissioner Guidelines to the National Privacy Principles. In addition, the issue is currently the subject of an inquiry by the OFPC, with the expectation that an 'Information Sheet' will be issued. The Model Code should reflect OFPC in this respect in the interests of consistency.

**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?**

The Model Code set the standard for calling hours when the former telecommunications authority *AUSTEL* specifically agreed to its recommendations on telemarketing being included. The permitted calling hours outlined in the Model Code have been accepted by the Federal Government in the context of the Financial Services Reform Act regulations.

The current calling hours take into account the working patterns of Australian families which require flexibility to attend to household matters, which are increasingly being conducted via telephone.

Where a consumer objects to receiving telephone marketing calls, protection is provided by the Federal Privacy Act 1988 and the related National Privacy Principles (NPPs). The NPPs give consumers the right to object to their personal data being used for the secondary purpose of direct marketing, which includes telephone-marketing approaches. Where a consumer objects to marketing approaches, the company must cease contacting the individual until such times as the consumer requests to be re-contacted.

**In addition, consumers that do not wish to receive telephone marketing calls can register with ADMA's National 'Do Not Call' service, which allows people to have their names suppressed from telephone marketing campaigns. It is a condition of ADMA membership that member companies screen their contact lists against the 'Do Not Call' file to ensure those registered on the service are not the subject of a marketing approach. The list is also widely subscribed to by non-members.**

In light of the above, ADMA submits that the current permitted calling hours should be maintained without alteration.

In relation to days of non-calling ADMA believes that ANZAC Day should be added in view of the attitude to that commemorative day in the Australian community. ADMA recommends retention of existing calling hours and days with the exception of Anzac Day.

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?**

The issue of consent is dealt with in the Privacy Act and the NPPs. In Australia and internationally the definition of consent is crucial and should not be subject to interpretation by other authorities.

ADMA believes that the Model Code should require names to be suppressed within one month of the request being made.

Thank you again for soliciting our feedback. Should you require further information or would like copies of the ADMA Code of Practice or associated Guidelines, please contact me or Jodie Sangster, Legal and Regulatory Affairs Manager, on (02) 9368 0366. We look forward to your feedback and our continued involvement in the issue.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R Edwards', with a long horizontal flourish extending to the right.

Robert L Edwards  
Chief Executive Officer