



PRIVACY

NEW SOUTH WALES

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Review of Direct Marketing Model Code
Consumer Policy Framework Unit
Competition and Consumer Policy Division
Department of the Treasury
Langton Crescent
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Dear Sirs/Mesdames

I have much pleasure in providing a brief submission to the Review of the Ministerial Council of Consumer Affairs (MCCA) *Direct Marketing Model Code of Practice*.

The former NSW Privacy Committee, whose functions have been taken over by my Office, took a close interest in privacy issues related to direct marketing. The Committee produced a Discussion Paper on this topic in April 1989. The Committee also made submissions, in May 1995 to the Working Group established by the MCCA, and in 1998 to the Australian Competition and Consumer Commission in relation to its determination on the ADMA Direct Marketing Code of Practice.

Since that date significant changes have affected the framework in which privacy issues relating to marketing arise. Private sector amendments to the Privacy Act mean that firms engaged in marketing with a turnover of more than 3 million dollars are now required to comply with the National Privacy Principles (NPPs). Small businesses which collect or disclose personal information for a profit will also be covered as of December 2002 as a result of section 6D(4) (c) and (d) and section 16D of the Privacy Act.

At the same time there has been a growing use of telecommunications and electronic media for marketing. This has contributed to the spread of direct selling techniques into other areas of business in a way which could be seen to call into question the way in which direct marketing has traditionally been defined.

The commencement of the Privacy and Personal Information Protection Act in February 1999 replaced the Privacy Committee with the Office of the NSW Privacy Commissioner (Privacy NSW). This has involved a greater focus on issues which arise under the NSW legislation and which primarily affect the NSW public sector. Nevertheless inquiries and complaints about direct marketing still represent a significant proportion of matters dealt with by Privacy NSW (3.8% of 2660 calls in 2000-2001, 6% of 2734 phone inquiries in 2001-2002, 7% of 235 written complaints closed in 2001-2002, 16% of 76 complaints closed in 2000-2001). These figures compare with rates reported in the Privacy Committee's 1995 submission of 10% for both written and phone complaints in 1993.

The recent legislative changes mean that I am happy to leave the substantial task of representing the privacy perspective in the current review to the Office of the Federal Privacy Commissioner. However I would like to bring a number of issues to your attention which in my view favour the retention of a self-regulatory model code.

Privacy Act coverage

National Privacy Principle 2.1(c) permits the use and disclosure of personal information for the secondary purpose of direct marketing subject to conditions as follows:

- (i) it is impracticable for the organisation to seek the individual's consent before that particular use; and
- (ii) the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; and
- (iii) the individual has not made a request to the organisation not to receive direct marketing communications; and
- (iv) in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that he or she may express a wish not to receive any further direct marketing communications; and
- (v) each written direct marketing communication by the organisation with the individual (up to and including the communication that involves the use) sets out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be directly contacted electronically;

The fact that NPP 2.1(c) only applies to use or disclosure for a secondary purpose means that it does not address marketing by an organisation which follows up a pre-existing relationship with its customers. Also, broad exemptions in the Privacy Act for employee records and political parties exclude coverage of a significant source of personal information and a significant form of direct solicitation which has attracted criticism in the past.

Other National Privacy Principles which can also be seen to affect the processing of personal information for direct marketing, include those relating to collection, accuracy, openness and maintaining an anonymity option. Special provisions also relate to the collection, use and disclosure of what section 6 of the Privacy Act defines as sensitive information. However these provisions do not necessarily address what many people regard as privacy intrusive aspects of direct marketing. These include intrusive marketing solicitation such as overly frequent telephone calls, unsolicited faxes and e-mails (spam). Indeed the relatively permissive approach to direct marketing in NPP 2.1(c) could be seen to fall short of emerging international best practice in relation to such issues as unsolicited e-mails.¹

Although the principles dealing with openness and notification at the time of collection might be thought to address the perennial question (*how did they get my name/address/phone number?*), our complaints experience is that members of the public seeking this information do not always receive a satisfactory answer, even though paragraph 55(b) of the Model Code requires marketers to disclose the source from which they obtained personal information. This could be explained by the limited coverage of the Privacy Act or because those covered by the Privacy Act treat NPP 2.1(c) as setting a minimum standard and ignore the implications of other relevant principles.

Even after 21 December 2002 it is unlikely that all firms engaged in direct marketing will be covered directly or indirectly by the NPPs. This uneven coverage makes it difficult for individuals affected by intrusive marketing to determine what remedies are available to them. It also makes it difficult for my Office to advise consumers with marketing related privacy concerns.

Intrusive telemarketing

The scale of telemarketing and its perceived intrusiveness have both grown since 1997. Part 3 of the 1997 Model Code provides some useful standards designed to avoid intrusive telemarketing practices such as overly frequent calls, calling at inconvenient times, or dissembling the purpose of calls. These are all issues which customers experience as infringements on their privacy but which the National Privacy Principles do not adequately address. In addition the Model Code's provisions on Identification Information (paragraphs 51 to 55) are more comprehensive than the notification requirements in NPP 1.3 or 2.1(c)(v).

In its 1995 submission to the MCCA Working Party the Privacy Committee raised concerns about the use of automated dialling equipment (ADE) in telemarketing. The Committee concluded that was not a major privacy issue in Australia at that point in time. There is little direct evidence to suggest that public concerns about ADE and predictive dialling have intensified, although it is not clear whether this is

¹ see for instance Article 13 of the European Union's *Electronic Communications Privacy Directive (2002/58/EC)* and Department of Treasury, *Guideline on Building Consumer Sovereignty in Electronic Commerce*, paragraph 2.3

due to limited use of such equipment, limited public awareness, voluntary compliance with overseas standards or other cultural differences.

Our complaints records do not indicate major problems with automated or predictive dialling. This is contrary to experience in the United Kingdom and United States, where there has been regulatory and self-regulatory intervention to set appropriate standards for the use of such equipment. This covers such issues as hanging-up before the person called has an opportunity to answer, calls falling out because no operator is available, delays in connecting to an operator, and the use of recorded or computer generated messages.²

It seems appropriate to keep these kind of ADE issues under review in the Australian context. Another emerging issue which the Review may wish to address involves the use of SMS text messaging for marketing purposes.

Paragraph's 56 and 57 of the Model Code refer indirectly to ADE issues, but in a way which does not readily identify to an uninformed reader what problems may arise from the use of this equipment. It may be appropriate for a revised code to provide a clearer definition so that consumers are sensitised to issues which may arise.

Unsolicited e-mail marketing (spam)

Privacy NSW has recently received an increasing number of inquiries about the privacy implications of unsolicited and unwelcome e-mail messages but to date has not developed a specific policy response to the issue. There are indications that concern about this practice is intensifying.³ The NOIE is currently conducting a Review of what it describes as *the Spam Problem*. The NOIE Interim Report has identified features of Spam which are experienced as privacy intrusive, but not necessarily addressed by the National Privacy Principles. For instance there are concerns over marketing of illicit products and services or the graphic or offensive nature of solicitations for health or sexually related products received on home computers accessible to children. Other concerns relate to the cost and waste of time in dealing with unwelcome messages, and the difficulty people face in contacting organisations to stop persistent spamming.

It has been questioned whether the indiscriminate harvesting and use of e-mail addresses without any attempt to identify individuals is covered by the Privacy Act's definition of personal information.⁴

² United Kingdom, Direct Marketing Association, *Code of Practice for Automated Dialling Equipment*, February 2002; US Direct Marketing Association *Telemarketing Guidelines* January 1999.

³ AC Nielsen. Consult, *NOIE SPAM presentation 2002* p 5

⁴ Office of the Federal Privacy Commissioner, *Unsolicited Commercial Emails or Spam and the Privacy Act 1998 (Cwth)* April 2002 (submission to NOIE SPAM Review)

It seems logical that a revised version of the Model Code should also address the Spam problem. In particular there should be standard notification requirements, similar to those in the Model Code for telemarketing to help recipients stop persistent spamming.

Most spam received by Australian Internet service providers comes from outside Australia, meaning that it is difficult to control through local regulation.⁵ This has led to interest in technical solutions which screen or filter unsolicited messages. The application of such measures means that the problem of spam may be experienced differently depending on the size of one's Internet service provider or whether one has a home or work account. Other self-help remedies have taken the form of black-listing or blockading offending sources. This is a potentially disorderly response which can cause as many problems as it solves.

The NOIE Interim Report suggested a more orderly Government sponsored response to identifying and discouraging major spammers. The Department of the Treasury has also approached this issue from a slightly different angle in its 2000 publication, *Building consumer sovereignty in electronic commerce: a best practice model for business*. Under this guidance, businesses are discouraged from sending marketing messages to people other than those with whom they have an existing commercial relationship or who have already said they want to receive commercial e-mail. This best practice guidance sets a higher standard than National Privacy Principle 2.1(c).

The fact that the Privacy Act does not address the range of concerns over spam provides a further justification for addressing this issue through an advisory code which seeks to provide consistent standards and is sensitive to the context of marketing.

Solicitations for services

At the beginning of this submission I referred to the fact that practices traditionally associated with direct marketing are becoming common in other kinds of business. These include personal solicitation for services and practices such as loyalty marketing and customer relations management which involve the intensive processing of customer information. Marketing over the Internet is another prime example of a hybrid which exhibits some features of direct marketing.

The statistics on Privacy NSW complaints and inquiries reflect a somewhat broader definition of marketing which is not confined to direct selling. A significant number of complaints relate to personal solicitation for services where people are upset when information they have provided in one context is used to market unrelated products or services to them. For example, real estate agents use personal details provided in connection with property registration and valuation to recruit potential sellers. The

⁵ AC Nielsen. Consult, *NOIE SPAM Presentation* p 17
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fact that this involves the use of personal information sourced from the NSW public sector gives an additional reason for our continued interest. The NSW Privacy and Personal Information Protection Act includes public register provisions which seek to limit legally authorised disclosures of personal information held by public sector agencies by reference to the purpose for which information is collected and held.

It may be appropriate to recognise that the traditional boundaries of direct marketing are becoming blurred and to use the Review of the Code to identify consumer related practices without an overly narrow focus on the kind of transactions to which they relate.

Usefulness of a non-mandatory model code.

There is still a valuable role for a Model Code which applies a relatively broad definition of direct marketing and identifies and addresses practices associated with the whole range of direct selling techniques. Such a Code could help to address inconsistent and incomplete privacy regulation. It could also provide authoritative guidance on privacy issues raised by consumer solicitation in a more realistic and context sensitive manner than is possible in legislation which is more general in scope and coverage.

I trust that these comments are of assistance and look forward to receiving your final Report.

Yours sincerely



Chris Puplick
PRIVACY COMMISSIONER