



Office of the
Victorian Privacy
Commissioner

Office of the Victorian Privacy Commissioner

Submission to the Ministerial Council on Consumer Affairs

on its

*Review of the Direct Marketing
Model Code of Practice*

11 October 2002

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I. Introduction

The Office of the Victorian Privacy Commissioner (“Privacy Victoria”) is an independent statutory body established by the *Information Privacy Act 2000* (“*Information Privacy Act*”).

The *Information Privacy Act* covers state and local government organisations and in certain circumstances contracted service providers to government.

Organisations subject to the *Information Privacy Act* are required to comply with 10 Information Privacy Principles which establish a scheme for responsible collection, use, disclosure, management and transfer of personal information about an identifiable individual.

Many of the contracted service providers to government are from the private sector. Some of the services that contracted providers provide to government may relate to direct marketing.

Aspects of direct marketing can be privacy invasive. Some practices can go beyond the simple attempt to match suppliers with the people who may want to buy them. In this context, Privacy Victoria recommends enhancing the Direct Marketing Model Code of Practice in relation to privacy.

II. The Privacy Landscape

Since the publication of the Model Code for Direct Marketing in November 1997 the privacy landscape of Australia has expanded.

The *Privacy Amendment (Private Sector) Act 2000* (Cth) took full effect on 21 December 2001, requiring most of the private sector to comply with National Privacy Principles.

In New South Wales the *Privacy and Personal Information Protection Act* 1998 took full effect from 1 July 2000. The Act requires NSW public sector organisations to comply with Information Privacy Principles. The *Health Records & Information Privacy Act 2002* recently took effect establishing a privacy regime for health information for the New South Wales public and most of the private sector.

From July 2002 Victorian public and private sector organisations must comply with Health Privacy Principles established under the *Health Records Act 2001* (Vic). This was followed by the *Information Privacy Act* which took full effect on 1 September 2002 requiring Victorian public sector organisations to comply with Information Privacy Principles.

Around the country other states are also at various stages of introducing new privacy legislation. The Northern Territory and Tasmania have Bills before each of their respective Parliament’s that relate to privacy protection.

Whilst there have been many international developments since the Model Code in relation to privacy, two developments in particular are likely to shape the relationship between privacy and direct marketing.

The OECD *Guidelines on Consumer Protection in the Context of Electronic Commerce*, promulgated on 9 December 1999, contain an explicit recommendation that business-to-consumer activities online should be conducted in accordance with the OECD *Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data* (1980), taking into account the OECD *Ministerial Declaration for the Protection of Privacy on Global Networks* (1998).

The European Union Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector is designed to regulate data retention, cookies and Spam.¹

III. Key differences in the Commonwealth *Privacy Act 1988* and the Victorian *Information Privacy Act* and their relevance to proposed enhancements to the Model Code in relation to privacy

Direct Marketing

The private sector provisions of the Commonwealth *Privacy Act 1998* (“*Privacy Act*”) deals with direct marketing in a different way to the Victorian *Information Privacy Act 2000* (“*Information Privacy Act*”).

Section 16F of the *Privacy Act* provides that where a private sector organisation is considered to be a contracted service provider for a Commonwealth contract the organisation must not use or disclose the personal information under the Commonwealth contract for direct marketing unless to meet an obligation under the contract.

The private sector must also comply with the National Privacy Principles which stipulate conditions for lawful use of personal information for direct marketing. These include:

- where personal information is collected for the primary purpose of direct marketing;
- where personal information is used for a purpose which relates to the primary purpose of collection and is within the reasonable expectations of the individual;
- where an organisation obtains consent for the use of personal information for direct marketing; and
- where the organisation gives individuals the opportunity to opt out of future direct marketing.

¹http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_20120020731en00370047.pdf (last visited 7/10/2002)

The use and disclosure principle (IPP2) of the Victorian *Information Privacy Act* has no specific exception to authorise Victorian public sector organisations, local councils and contracted service providers to direct market.

Contracted service providers

Contracted service providers to state government are not bound by the federal *Privacy Act 1988* in relation to their conduct under a state contract. The federal Act expressly gives way to state regulation if organisations are providing services under a State contract.

Contracted service providers will only be bound by the *Information Privacy Act* if the outsourcing agency has included a provision in the contract making them subject to the Information Privacy Principles or to an applicable code of practice. Without such a term, the outsourcing Victorian government organisation risks being responsible for the privacy breaches of their service providers.

Increasingly there has been a shift in the state government's approach to service provision. Whether a service is provided by government or to government the private sector play a more prominent role in the delivery of part or all of government services. In this context, many state government organisations and local councils are entering into contracts with outside suppliers to provide services that may include marketing or that may lead to access for the service providers to personal information useful to marketing by the service provider or others.

Many private organisations engaged in marketing on behalf of Victorian government organisations are likely to have to comply with privacy principles in some way or another. Contracted service providers with a relevant term in their contract will have to comply with the Victoria many organisations and many will be members of ADMA whose Model Code refers to privacy principles akin to the National Privacy Principles.

However, there will still be some organisations which are not subject to any privacy principles. In this context, reference to privacy in the Model Code would signal a desire for consistency across the industry.

Business Interests

The Federal Privacy Commissioner, in performing functions or exercising powers under the *Privacy Act*, has to have regard “for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way”.

There is no specific requirement for the Victorian Privacy Commissioner to assist businesses to achieve their objectives. The objects of the Victorian *Information Privacy Act* state that the Victorian Privacy Commissioner has to

balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information in the public sector. To the extent that commerce relies on the flow of information, it is subsumed in the broad balancing of those competing interests required of the Commissioner.

IV. Definitions under the Model Code

Consumer

The objects of the review are to determine the effectiveness of the Direct Marketing Model Code in protecting consumers and ensure the requirements of the Code satisfy fair trading and consumer protection needs in a changing regulatory and market environment. The review also seeks to ensure the Model Code's provisions continue to be relevant.

Under the Model Code the definition of consumer refers to a person, and in this context is taken to mean a living natural person.

Neither the *Privacy Act* nor the *Information Privacy Act* protects personal information about a deceased person. The *Health Records Act* offers protection for health information about a deceased person for a period of 30 years after death.²

Direct marketing to a deceased person can have a negative impact on the deceased person's family. Besides the obvious squander of natural resources and money, direct marketing to a deceased person invades the privacy of people who have lost loved ones, reviving their grief and sometimes angering them.

The effect direct marketing material can have on a deceased individual's family is reflected in a personal example from Jeff Sovern, in his article *Opting in, Opting out, or no options at all*³:

"In 1995, my wife died. My daughters were then three and five years old. To save time, I began purchasing my daughters' clothing from catalogue companies. Initially the catalogues I selected clothes from were addressed to my wife..... Over time, I began to receive catalogues from companies I had not bought from, presumably because they had acquired my name from the companies whose clothes I had purchased.....Eventually, however, I began to receive catalogues from companies that sold women's clothing. These catalogues I was not so pleased to receive."

To minimise the pain and suffering caused to families of deceased persons, a suppression list with names, addresses and telephone numbers to be removed from marketing solicitations would offer the families of deceased persons

² See Section 95 of the Health Records Act

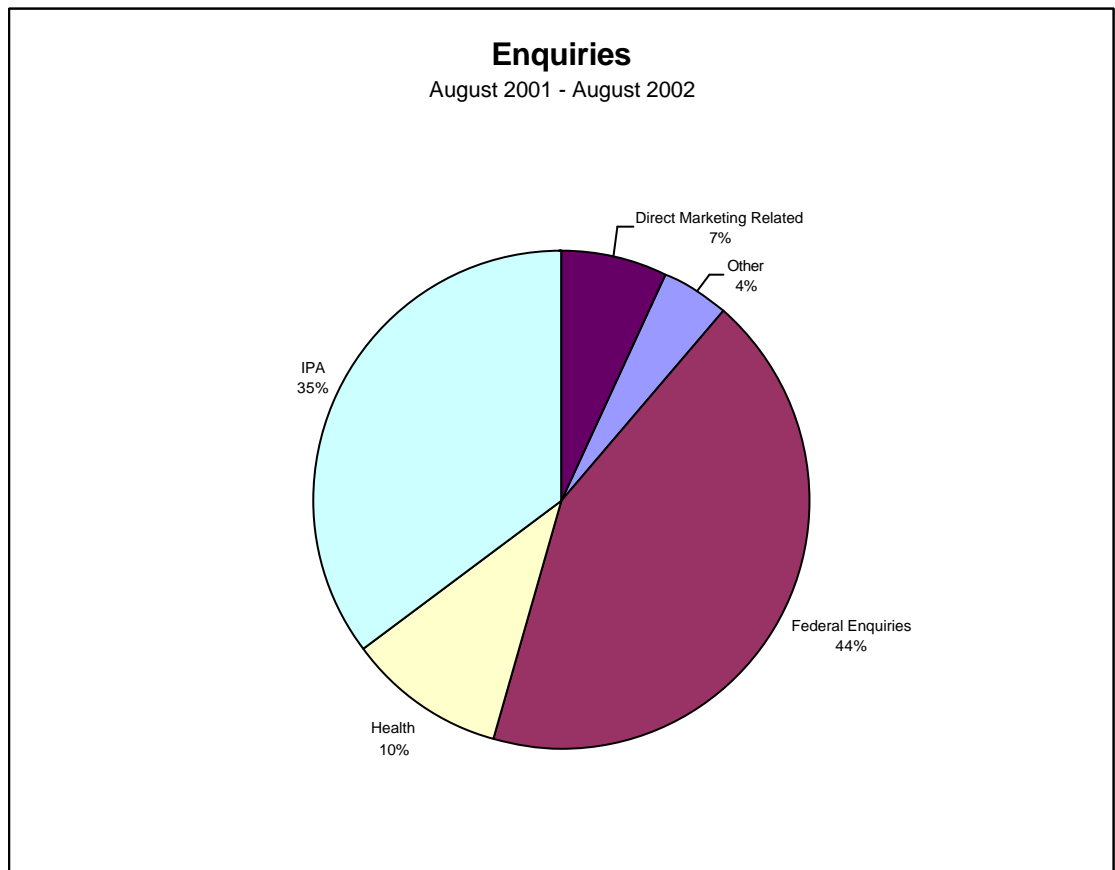
³ Jeff Sovern, in his article *Opting in, Opting out, or no options at all*

greater privacy protection. Routine review and updating of lists will increase both the accuracy of the information direct marketers hold and consumer confidence in the direct marketing industry.

V. Experience with complaints in relation to direct marketing

Privacy Victoria has received many enquiries about direct marketing. (Formal complaints have been able to be made under the *Information Privacy Act* only since 1 September 2002).

The pie chart below indicates that as at the end of August 2002 the issue of direct marketing has amounted to 7% of overall enquiries. While on its own, the percentage may not appear high, given that most other enquiries related to questions about the introduction of the *Information Privacy Act*, health matters or the Federal Privacy Commissioner’s jurisdiction, direct marketing enquiries were over represented compared to other areas. The figure is likely to be higher given a proportion of enquiries re-directed to the Federal Privacy Commissioner’s office will have related to direct marketing.



A high percentage of these enquiries are concerned with asking how to stop direct mail and direct marketing e-mail from being sent. The prevalence of this sort of direct marketing enquiry seems to reflect the growing choice by many individuals to be added to ADMA’s Do not mail/Do not call list.

In May 2002 Stephen Brook reported in *The Australian* that in the past year requests to be included in ADMA's Do not Mail/Do not call list has seen it nearly double to 49,000 names, according to the annual report released by association's compliance monitor, the ADMA code authority.⁴

VI. Direct marketing and electronic commerce

The Discussion paper notes that some direct marketers operate internationally, as well as in Australia. It is desirable that the regulatory approach taken in Australia conforms, as far as possible, to best practice regulatory standards applying in the countries where these companies operate.

In many respects, technology and the drive to e-commerce has been the impetus for public concern about privacy.

Before the use of computers and global positioning systems it was not as easy to collect large quantities of personal information about individuals, sort and sift data, or use individual's personal details to construct a profile of the individual.

Particular technological issues that cut across privacy and direct marketing that the Model Code may like to address are the issues of Spam and cookies. As mentioned above (II privacy landscape), the European Union has recently passed a directive addresses these issues.

Spam, otherwise known as electronic junk mail or junk newsgroup⁵ is an issue of concern for consumers and the public and private sectors.

It is important that this issue be addressed in the Model Code because the majority of spamming appears to be done by companies that are unlikely to be members of peak bodies, such as ADMA. Accordingly, someone who signed up to the Do not call /Do not mail list administered by ADMA would still receive unsolicited e-mails from non-members.

In addressing the issue of Spam Privacy Victoria favours an opt-in system for e-mails, faxes, automated calling systems and SMS Spam. This means that individuals should give prior permission for receiving unsolicited electronic communications for marketing purposes where the sender of Spam has no existing relationship with the intended recipient.⁶ This would be consistent with the EU Directive on electronic communications.

Cookies impact on a consumer's ability to interact with organisations anonymously. Organisations should provide users with clear and

⁴ *The Australian* Stephen Brook [Direct Marketers aim to be consumers friends](#) p 11

⁵ <http://www.webopedia.com/TERM/s/spam.html> the generally accepted version is that it comes from the Monty Python song, "Spam spam spam spam, spam spam spam spam, lovely spam, wonderful spam..." Like the song, spam is an endless repetition of worthless text

⁶ http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/l_20120020731en00370047.pdf

comprehensive information in advance about the purposes of cookies and offer them the possibility to refuse cookies.

VII. Collection and use of information from publicly available sources

Public registers

Victorian public sector organisations and local councils must administer public registers as far as reasonably practicable in accordance with the Information Privacy Principles.

In the context of responsible administration of public registers, the Victorian Parliament has signalled that searching through names and addresses and other information on a public register in order to market products and services may be an interference with the privacy of an individual.⁷

Organisations, to which this Model Code applies, are the end users of the personal information held on the public register. They too should have responsibilities in the use of individuals personal information held on public registers. The continued availability of information on public registers to use for direct marketing relies on responsible information management and consumer confidence.

Without both, Australia may turn towards schemes of licensing or registration of organisations seeking permission to use major public registers, as have appeared elsewhere.⁸

This approach may be overly prescriptive but in the absence of written assurances from organisations that individual's personal information obtained from a public register will not be misused, along with the deterrent effect of potential denial of bulk access, an approach entirely worthy of public debate.

VIII. Consent to receive direct marketing sent on its own or with non-direct marketing material

The Commonwealth National Privacy Principle which relates to use and disclosure expressly permits the private sector to direct market through the use of an opt out model. This is where the individual must perform some physical act, for example, to tick a box and send a response, in order to stop the direct marketing material.

⁷ Explanatory Memorandum to the *Information Privacy Act 2000*, clause 11.

⁸ See J.E.Davies, C. Oppenheim and B Bogusz, Study of the Availability and Use of Personal Information in public registers: Final Report to the Office of the Data Protection Registrar (United Kingdom), September 1999 available at <http://www.dataprotection.gov.uk/dpr/dpdoc.nsf> (last visited 11/10/2002).

The Victorian Information Privacy Principles do not make express provision for direct marketing as a secondary use of personal information collected for a different primary purpose.

In Victoria, government organisations and private sector organisations that contract with government to deliver marketing services should approach consent through the use of an opt-in model. This reflects the different relationships people have with the private and public sectors. Generally, a person can choose whether to do business with most private sector organisations and whether to give personal information. But state and local government organisations can collect personal information under law, and people have no real choice but to provide it.⁹

This element of compulsion is relevant in assessing what can properly be done with the information. A private sector organisation wishing to use personal information that state and local government has collected under law should have informed voluntary consent from the subjects of that information before they use or disclose it (for fee or otherwise) for direct marketing. A blank opt-out tick box is not enough to imply consent; a clear indication that a person has opted in is required.¹⁰

The means to exercise privacy through an opt-in standard should apply to private sector organisations that enclose marketing material with non-direct marketing material where the non-direct marketing material concerns personal information that has been collected by or under law.

To illustrate, imagine that a government body with a licensing function requires the provision under law of individual's names and addresses as a prerequisite to getting a licence.

A mailing contractor is responsible for despatching licensing renewal notices. A third party supplies advertising material to the contractor for inclusion in the envelope with the renewal notice.

The primary purpose of collection by the regulator relates to licensing. For secondary use to apply without consent the use has to be related to the primary purpose and an individual should reasonably expect the organisation to use the information for this secondary purpose. Is marketing of a third parties' products or services a use of the name and address for a purpose related to the primary purpose of collection? Would an individual reasonably expect use for that secondary purpose?

Opting in to receive direct marketing material where information is collected compulsorily will limit direct marketing to those individuals who indicate that

⁹ The idea of voluntary informed consent through the use of an opt-in mechanism is recommended in the Report from Privacy Victoria concerning *Public Registers and Privacy: Building Permit Data August 2002*. This approach reflects the partial shift in control from the collectors and users of personal information to the sources and subjects of it that is at the core of information privacy law.

¹⁰ Victorian Privacy Commissioner, Paul Chadwick, *Privacy Aware* Aug-Sept 2002.

they wish to receive the material. Some element of control will be returned to the individual about what level of intrusion flows from providing their personal information compulsorily for the primary purpose. That much control was originally absent.¹¹

IX. Conclusion

Direct marketing techniques can be privacy invasive. In the context, of inadvertently marketing to deceased persons and their families it can have a harmful effect.

Any attempt to enhance the Model Code in relation to privacy needs to take account of the changes in Australia's privacy landscape, the changes in delivery of government services and the differences in the relationships between public and government on the one hand and consumers and commerce on the other.

Advances in electronic commerce can be detrimental to privacy. SPAM and cookies impact on consumer's privacy.

The use for direct marketing of personal information held on public registers needs debate, attention, limits and accountability that reflects better the importance of personal privacy embodied in recent law.

¹¹ United States authors have referred to giving the individual more control in the collection and management of their personal information. See Priscilla M. Regan in *Legislating Privacy Technology, Social values, and Public Policy 1995* University of North Carolina Press p229; and Oscar Gandy, *The Panoptic Sort: A Political Economy of Personal Information* (Boulder: Westview Press 1993), p140