

Trading Act 1986 (Tas) and were viewed by some consumer representatives as more acceptable because they had been agreed to by parliament.

Calling Frequency

- 7.31 The NSWPC submitted that the calling frequency provision contained in clause 12 needs to be clearly subject to the proviso that if an individual requests that they receive no further calls that request will be honoured indefinitely.

Interested Parties' Responses to ADMA's Amendments

- 7.32 Interested parties made a number of comments on ADMA's response to the conditions that the Commission had set down in its draft determination.

- 7.33 The CLCV submitted that the amended Code fails to address the Commission's concerns in so far as:

- equality of representation on the Authority is not provided for;
- the opportunity for all parties to participate fully in the enforcement process is not provided for;
- the Code does not address the provision of reasons for decision either by the Compliance Officer or the Code Authority;
- and guidelines for the imposition of sanctions have not been sufficiently addressed. For example, it asked what does 'a breach of a serious nature mean'?

- 7.34 The Community Information and Referral Service of the ACT (CIRS) also expressed concern about the composition of the Code Authority as amended. CIRS stated:

- It is particularly important that industry and consumer representatives are of an equal number in order to maintain an equitable balance in both the decision making and philosophy of the Committee.
- There is already a strong possibility that a perceptual problem is arising with the establishment of the Code Authority as the two proposed consumer representatives were recruited by the industry body rather than by a more transparent and public form of recruitment and appointment. (This was a concern also expressed by the ACA.)
- It is difficult to see how an independent chair can substitute for a consumer representative. While the independent chair is not a participant in the industry, it would compromise the Chair's necessary independence if that position was seen to be a de facto consumer representative or expected to support the official consumer representatives in a voting situation.

Anti-Competitive Detriment

- 7.35 In addition to the anti-competitive detriment cited by ADMA, Mr Robin Whittle submitted that there are unique anti-competitive aspects to the business practice of direct marketing that concern the cost burdens placed on businesses by being targeted, against their will, by direct marketers. He submitted that these costs include tying up telecommunications services, the cost of receiving e-mails and faxes, staff time wasted, and the disruption to work and concentration, caused by direct marketing approaches by telephone, e-mail and door to door sales people. Mr Whittle submitted that ACCC approval of the ADMA Code would constitute government approval for ADMA members to systematically engage in intrusive marketing practices that cost almost all Australian businesses significantly in terms of lost productivity.
- 7.36 Professor Greenleaf submitted that ADMA members compete (using methods of direct marketing) in a number of markets to supply goods or services that are or could be, in close competition. In each case the market is comprised of the competing direct marketers and the recipients of direct marketing approaches. He argued that ADMA members compete in those markets by virtue of differences in the nature and quality of the direct marketing techniques that they use. Professor Greenleaf submitted that one of the differentiating factors is the extent of privacy protection provided by the direct marketing techniques that are used. He argued that consumers might choose to buy products or services in part because of the direct marketing techniques that are used to sell them. This includes the way in which the direct marketer deals with aspects of the consumer's privacy, such as the intrusiveness of the communication and the way in which personal information is used or misused.
- 7.37 Professor Greenleaf submitted that one effect of ADMA's code is that it will discourage competition in the provision of different standards of privacy protection as part of direct marketing. In particular, he argued, it will have the effect of discouraging the provision of standards of privacy protection that is higher than those contained in the ADMA Code. He argued that other effects would also result, including the following:
- The content of any Code that receives ACCC authorisation, as being in the public interest will be legitimated as 'all that the public has the right to expect'.
 - Direct marketers will therefore think of this as 'the industry standard', and as all that needs to be offered. They will be indirectly encouraged not to provide any higher standard of privacy protection.
 - Consumer demand for higher standards of protection from businesses will be blunted. There will be a tendency for consumer complaints to companies or regulators about the standard of privacy protection provided by ADMA members to be dismissed by references to ACCC approval. In the absence of a Code, there is likely to be more persistent consumer demand for higher standards, resulting in less competition to provide such standards.

- If uniform standards are set for privacy protection in all forms of direct marketing, this will discourage different levels and forms of protection being provided for direct mail, telemarketing and e-commerce, even though these three different contexts may justify different forms of protection. Such uniform standards will therefore lessen protection and competition between actual or potential providers of similar goods and services in these different contexts. He submitted that the ADMA Code proposes such uniform standards.

7.38 Mr Hamish Gilmore, the South Australian Commissioner for Consumer Affairs, submitted that the availability of sanctions against a member, such as expulsion from ADMA is not anti-competitive in that the sanction does not extend to exclusion from the industry as a whole, or a prohibition on a person becoming a member some time in the future. He stated that membership of ADMA is not a benchmark for the industry; the various competition and fair trading laws fulfil that role. The Commissioner submitted that the following clauses were somewhat anti-competitive:

- those requiring members to ensure that their suppliers will comply with the Code; and
- those empowering ADMA itself to request non-members to comply with the Code.

ADMA's Response to Comments made by Interested Parties

Definition of Direct Marketing

7.39 ADMA made the following submissions with respect to its definition of direct marketing:

- It is based on the definition contained in the Direct Marketing Model Code of Practice. That definition, it submitted, singles out one segment of direct marketing, that is, the charitable and fundraising segment and infers, through reference to a contract, that the direct marketer keeps a record of the transaction. ADMA stated that it dropped the specific reference to fundraisers because if it listed all of the different activities that came under the definition of direct marketing, the definition would be unwieldy. ADMA argues that its definition of fundraiser contained in Cl.3.6 of Appendix 1 tie fundraisers to the definition of direct marketer.
- It has presented a classic definition of direct marketing, albeit one that may not be comprehensive. It argues that it is direct marketers who have to see themselves and what they do reflected in the Code; the definition that has been put forward is one that any direct marketer should be able to identify with.
- If the definition of direct marketing included sending an offer to customers to get them to come to a retail store, they would not be able to satisfy some key requirements in the NPPs. For example, if the flier has no direct

response component to it, the retailer would be unable to satisfy the compulsory requirement under the ADMA Code to provide an opportunity to opt out of receiving further direct marketing offers.

Part E – Data Protection

- 7.40 ADMA stated that the PC's November 20, 1998 Revision Draft of the NPPs has upheld the original drafting of NPP 2, with the addition of a specific requirement that "if the individual declines to receive further direct marketing communications, the organisation does not send any." ADMA claim that this addition has been accommodated under clause 34 of section E of the Code of Practice which requires a direct marketer to remove a consumer's name from all internal marketing lists or lists for transfer to a third party at the request of the consumer.

Consultation

- 7.41 With respect to consultation, ADMA submits that the fair trading elements of the Code of Practice embody those contained in the Model Code of Practice that was endorsed by MCCA. Further, it stated that:

- the telemarketing provisions are lifted from the government's APAC report entitled "Telemarketing and the Protection of the Privacy of Individuals".
- the e-commerce component contains the latest draft OECD Guidelines for Electronic Commerce"; and,
- the data protection section is taken from the NPPs.

ADMA submits that all of these published standards have been the subject of extensive consultation over a period of three to five years.

E-Commerce Standards of Practice

- 7.42 ADMA submits that its e-commerce standards of practice are drawn from the latest OECD Guidelines for electronic commerce and are consistent with the Consumer Protection in Electronic Commerce Principles that were prepared by the Australian National Advisory Council on Consumer Affairs. ADMA also acknowledged that these standards are still being reviewed.

Monetary Compensation for Consumers

- 7.43 With respect to monetary compensation for consumers, ADMA submits that it has no statutory right to affect rights, other than those of members to belong to the association, nor does the Authority have the power to measure damages suffered by individuals or adjudicate upon the rights that might give rise to such damages.

- 7.44 It also expressed concern that the establishment of a compensation fund would attract “every kind of charlatan with a real or imagined complaint against direct marketers”. ADMA considers that it would be appropriate to raise this matter in the context of the one year review of the Code so that reference could be made to other compensation schemes in other business sectors to ensure complementarity.

Further Consultation

- 7.45 After taking into account the views of interested parties outlined above, and engaging in further discussions with the applicant, Commission staff drafted a proposed final determination in relation to the application for authorisation. Chapters 8 and 9 of the proposed determination outlined a number of conditions of authorisation that staff intended to recommend that the Commission include in its determination. These chapters were circulated to selected consumer and privacy advocates, as well as a number of relevant government departments, for comment.
- 7.46 The Commission received a number of submissions during this third round of consultation² and while most submissions were supportive of the proposed conditions contained in draft Chapters 8 and 9, a number of criticisms continued to be made in relation to certain aspects of ADMA’s Code. For instance, consumer and privacy advocates continued to criticise:
- the lack of coverage of ADMA’s Code in terms of the number of direct marketing contacts that will be regulated. Particular concern was expressed in relation to the Code’s coverage of electronic commerce and telemarketing contacts.
 - ADMA’s failure to adopt an opt-in approach with respect to both telemarketing and email direct marketing approaches.
 - the failure of the Code of Practice to provide for monetary compensation where an ADMA member is found to be in breach of one of its provisions. The Privacy Commissioner re-stated his view that the award of monetary compensation in appropriate cases should be explicitly included in the Code.
 - the fact that the Code Authority, which is responsible for enforcing the substantive provisions of the Code of Practice, is also charged with the responsibility of reviewing the performance of the Code. Advocates were strongly of the view that the Code of Practice should provide for independent review.
 - Part D of the Code of Practice concerning electronic commerce. Advocates criticised Part D on the basis that it contained no net public benefit and had the potential to damage the development of effective

² Copies of these submissions are available from the Public Register that is maintained by the Commission.

consumer protection standards in electronic commerce that are being developed in other arenas.

8. Commission Evaluation

Introduction

- 8.1 The Commission's evaluation of Application A40077 is made in accordance with the relevant statutory test that is outlined in chapter 4 of this determination.
- 8.2 In general terms, the Commission is required to determine whether the provisions of the Code of Practice for which the applicant has sought authorisation are likely to result in a benefit to the public that is sufficient to outweigh any likely anti-competitive detriment resulting from the provisions.
- 8.3 It should be noted that the Commission's role in the authorisation process is not to design, or insist upon, the development of an ideal Code of Practice, it is constrained in this respect by its statutory duty. In *Re Media Council of Australia (No. 3)*³ the Australian Trade Practices Tribunal (now the Australian Competition Tribunal) made the following observation with respect to its own role:

"... an important matter to have in mind when approaching our analysis of the Codes is that the Tribunal's function is not to require the design of an ideal system of code administration within the advertising industry, but to determine whether the proposed Codes within the Media Council system fulfil the statutory tests prescribed by sec. 90 of the *Trade Practices Act*."

Further, in *Re: 7 – Eleven Stores Pty Ltd, Independent Newsagents Association, Australasian Association of Convenience Stores Inc*⁴ the Australian Competition Tribunal ('the Tribunal') stated the following:

"... the Commission's role is not to design for others business arrangements that can be authorised, nor insist on optimum arrangements before granting authorisation, but rather to assess formally whether some proposed conduct that might breach the provisions of the Act yields a net public benefit, and therefore can be authorised."

- 8.4 The Commission accepts that direct marketing, and distance selling in particular, has many specific characteristics which cause it to differ from shop front retailing. For the purposes of consumer protection and consideration of ADMA's Code, 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. The Commission also accepts the statement by the applicant, and contained in the Model Code, that these distinctions mean that it is appropriate that specific rules are developed to govern those who are engaged in direct marketing and distance selling.

³ (1989) ATPR 40-933 at page 50,123.

⁴ AUSTLII [1998] ACompT 3 (18 November 1998).

Scope and Coverage

Scope

8.5 The extent of public benefit that arises from ADMA's Code depends upon the variety of situations that its provisions cover. Clause 6 of Part A of the Code states that it binds all ADMA members and all employees, agents or subcontractors of ADMA members. Clause 9 states that the Code requires members to ensure that their suppliers comply with the Code, by requiring that it is a condition of contracts between members and their suppliers.

8.6 Detailed provisions of ADMA's Code are, however, often limited by the definition of direct marketer that is contained in clause 3.5 of Appendix 1 of the Code. 'Direct marketer' is defined as:

"... an individual, corporation, partnership or organisation contracting or intending to contract for the sale of goods or services to a customer where:

- the customer is contacted through a means of distance communication; and
- customers are invited to respond using a means of distance communication; and
- it is intended that the goods or services be supplied under a contract negotiated through a means of communicating at a distance; and,
- a record of the transaction is captured and maintained on a list or database for further marketing purposes."

8.7 Interested parties claim that this definition limits the application of the Code of Practice in the following ways:

- telemarketing, mail or e-mail that is aimed at promoting goods or services available through retail stores or separate phone or mail response is not covered;
- fundraisers are excluded because there is no contract; and
- situations where an ADMA member sells through distance communication are not covered unless a record of the transaction is captured and maintained for further marketing purposes.

8.8 ADMA made the following submissions with respect to its definition of direct marketer:

- It is based on the definition contained in the Direct Marketing Model Code of Practice. The specific reference to fundraisers was dropped because listing all of the different activities that fall within the definition of direct marketing would make the definition unwieldy. Cl.3.6 of Appendix 1 ties fundraisers to the definition of direct marketer.
- It has presented a classic definition of direct marketing. It is one that any direct marketer should be able to identify with.

- If the definition of direct marketing included sending an offer to customers to get them to come to a retail store, ADMA would not be able to satisfy some key requirements in the NPPs: For example, if the flier has no direct response component to it, the retailer would be unable to satisfy the compulsory requirement under the ADMA Code to provide an opportunity to opt out of receiving further direct marketing offers.

8.9 As noted by interested parties, ADMA's definition of direct marketer is particularly important as key provisions contained in the Code apply only to direct marketers (as well as their employees, agents, sub-contractors and suppliers).

Part B – Standards of Fair Conduct

8.10 Most of the provisions contained in Part B of ADMA's Code, with the exception of clauses 4, 5, 8, 10, 11, 27, 28, 33 and 34 refer specifically to direct marketers, and are accordingly limited in their application to direct marketers. The provisions of Part B are summarised in chapter 3 above and deal largely with the information that should be provided when direct marketers are making an offer or delivering goods or services, the offering of incentives, delivery, payment and cancellation and refunds.

8.11 The Commission notes ADMA's claim that Part B of its Code is based on the provisions contained in the Model Code. Clause 6 of the Model Code provides that its Part 2, the fair trading requirements which are reflected in Part B of ADMA's Code, are designed to apply to distance sellers rather than charities and fundraisers. The Model Code defines a distance seller as:

'... an individual or organisation contracting or intending to contract for the sale of goods or services to a consumer where the consumer is contacted through direct marketing. A distance seller may engage in direct marketing itself or employ a direct marketer to do so.'

'Direct marketing' in turn is defined as:

'... the marketing of goods or services or the seeking of donations through a means of communication at a distance where:

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

8.12 As the provisions of Part B of ADMA's Code set standards of fair conduct in respect of pre and post sale behaviour as well as in respect of contracts of sale, it is appropriate that these provisions apply to those ADMA members who seek to contract with customers for the supply goods or services. Thus, Part B of ADMA's Code would not apply to charities and fundraisers (as is also the case with Part 2 of the Model Code). However, the provisions of Part B are further limited in their application to direct marketers as defined by ADMA and, as noted, this definition requires that a record of the sales 'transaction is captured and maintained on a list or database for further marketing purposes'. Consequently, the provisions of Part B may, as suggested by interested parties, apply only when a sale actually occurs. Therefore, the pre-sale standards of conduct in relation to the promotion of goods or services may only be enforceable against an ADMA member where such conduct

results in a sale. Further, the provisions of Part B may not be enforceable against an ADMA member if the member does not maintain a record of the sales transaction or if the member does not intend to use the record for further marketing purposes.

- 8.13 As noted, the application of equivalent provisions in Part 2 of the Model Code is clearly not so restricted, with clause 6 of the Model Code providing that such provisions are designed to apply to 'distant sellers' (but not to charities or fundraisers). However, it is also noted that clause 7 of the Model Code states that Part 2 is not intended to apply in circumstances where a contract is initiated from a contract solicitation made using a means of communication at a distance but is finalised in the presence of both parties to a contract. The footnote to clause 7 states that the other Parts of the Model Code apply to the components of the transaction conducted at a distance, but to apply the requirements of Part 2 would place businesses using this part distance/part traditional approach at a competitive disadvantage to other retailers.
- 8.14 The Commission concludes that ADMA's definition of direct marketer is not likely to result in benefit to the public in view of the limits it places on the scope of ADMA's Code. ADMA's definition of direct marketer should be amended so that it is equivalent to the Model Code's definition of 'direct marketer' which includes by reference the Model Code's definitions of 'direct marketing' 'telemarketer' and 'telemarketing'. The Commission also concludes that it would be appropriate for ADMA to limit the scope of Part B through provisions equivalent to clauses 6 and 7 of the Model Code.

Part C – Fair Conduct Relevant to Telemarketing

- 8.15 Clauses 1, 2, 3, 9, and 10 of Part C of ADMA's Code apply to 'direct marketers', while clauses 4, 5, 6, 7, 8, 11 and 12 apply to 'telemarketers'. The Commission notes that 'telemarketer' is not defined in ADMA's Code. Clause 3.7 of Appendix 1, however, defines a 'telemarketing telephone call', a term that is otherwise not used in the Code, as:

'... a telephone call initiated by a direct marketer or by an automatic dialler mechanism of a direct marketer that is designed to induce customers to purchase goods or services.'

In light of this clause it appears that the term 'telemarketer' refers to a 'direct marketer' who uses a telephone or automatic dialling mechanism to contact prospective customers. The application of the provisions of Part C is therefore limited to direct marketers as defined by ADMA.

- 8.16 As discussed in chapter 3 of this determination, the provisions contained in Part C set standards relating to the identification information that must be provided by direct marketers, information that must be provided at the customer's request, acceptable calling conduct, permitted calling times, line disconnection times and calling frequency. These provisions are primarily concerned with regulating the times when direct marketers can contact prospective customers, and the manner in which they conduct themselves while communicating with these prospective customers, that is, conduct that takes place whether or not a sale results from the contact.

- 8.17 The Commission is concerned that the application of Part C may be considerably restricted by ADMA's definition of direct marketer (as it is in respect of Part B, see paragraph 8.12 above). It is also noted that the provisions of Part 3 of the Model Code (which are reflected in Part C of ADMA's Code) are specified to apply to 'distance sellers, charities and fundraisers engaging in telemarketing' (see clause 50 of the Model Code). Telemarketing, is defined in the Model Code as meaning:

'... all activities that relate directly or indirectly to direct marketing and which involve the use of a telephone, facsimile machine, or other customer equipment connected to a telecommunications network to contact a consumer.'

- 8.18 Given the type of conduct that Part C of ADMA's Code is designed to regulate, the Commission concludes that in order to give rise to adequate public benefit, the Part should apply to all ADMA members who contact prospective customers via telecommunications equipment such as telephones, facsimiles etc, whether or not they are seeking to contract with customers for the supply of goods or services. As the conduct that Part C regulates applies equally to those trying to sell goods or services or those trying to generate donations, the scope of the Part should cover not only direct marketers (see paragraph 8.14 above) but also fundraisers and charities, as is the case in the Model Code.

Part D – Fair Conduct Relevant to Electronic Commerce

- 8.19 An equivalent of Part D of ADMA's Code is not contained in the Model Code. ADMA claims that Part D is based on the Draft OECD Electronic Commerce Guidelines. The Commission notes that Part D of the Code does not use the term 'direct marketer' or any similar term to limit its application to particular ADMA members only. The Commission concludes that Part D potentially applies to all ADMA members.

Part E – Fair Conduct Relevant to Consumer Data Protection

- 8.20 The provisions contained in Part E of the Code are clearly limited to direct marketers as defined by ADMA. Interested parties were highly critical of this limitation. The Privacy Commissioner, for instance, stated that:

'... the public benefit of the Code could be greater if the application of Part E, the data provisions, were less restrictive. The definition in Appendix 1 limits the scope of 'direct marketing' and hence the scope of the code by excluding the sending of material where:

- the intention is to induce the recipient to visit a retail outlet to buy goods or services, or
- the contract itself is not negotiated remotely; or
- the transaction entered into is not for the provision of goods or services.

... much of the public benefit that could arise from Part E springs from the requirements to handle responsibly the personal information used to target marketing material – in a broad sense – to particular individuals. These requirements apply just as much to personal information used to encourage visits to retail outlets or to solicit donations as they do to approaches that offer a remote means of purchasing goods or services.

... So far as consumers are concerned, any personalised approaches based on information about their tastes and demographic characteristics have information privacy implications. Questions such as 'where did they get my details' and 'what else do they know about me' are just as applicable to promotions for physical retail outlets as they are to catalogue or Internet sales, and to charities as much as for-profit business. ... [T]he protections of Part E should apply to all forms of personalised, unsolicited advertising or solicitation engaged in by ADMA members.'

- 8.21 The Commission is concerned that the application of Part E may be considerably restricted by ADMA's definition of direct marketer (as it is in respect of Parts B and C, see paragraphs 8.12 and 8.17 above). In view of this restriction the Commission is not satisfied that the provisions of Part E would be likely to give rise to sufficient public benefit so that authorisation may be granted. As with Part C of ADMA's Code, Part E is concerned with conduct that is not dependent on the selling of goods or services. It regulates the types of personal information that an organisation is able to collect, and what the organisation can do with that information. The Commission concludes that, like Part C, Part E of ADMA's Code should cover not only direct marketers (see paragraph 8.14 above) but also fundraisers and charities.
- 8.22 In addition, the Commission sees no public benefit in limiting Part E of ADMA's Code by excluding from its scope the conduct of direct marketers' sending an offer to customers to get them to come to retail stores. The Commission shares the Privacy Commissioner's view that the need to handle responsibly the personal information used to target marketing material applies just as much to personal information used to encourage visits to retail outlets as to approaches that offer a remote means of purchasing goods or services.
- 8.23 The Commission notes ADMA's submission that direct marketers would not be able to satisfy some key requirements of Part E (and the NPPs) if the application of Part E is widened to include the sending of an offer to customers to get them to come to a retail store. ADMA submitted, for example, that if the flier has no direct response component to it, the retailer would be unable to satisfy the compulsory requirement under ADMA's Code to provide an opportunity to opt out of receiving further direct marketing offers. It is also noted that APCC considered this argument entirely spurious, and submitted that a phone number or address can and should be provided for the purposes of opting-put and other complaints in all cases. The Commission considers that any compliance problems caused by extending the application of Part E in this way should be able to be resolved through discussions between ADMA and the Privacy Commissioner, who has welcomed the Commission's suggestion of such discussions.
- 8.24 The Commission is of the view that ADMA should be granted interim authorisation for a period of six months in respect of a provision excluding from the scope of Part E the conduct of direct marketers sending offers to consumers to get them to come into retail stores. This period will provide ADMA with the opportunity for discussions with the Privacy Commissioner to overcome the compliance problem raised by ADMA.

Part F – Enforcement

- 8.25 Part F of ADMA's Code sets out the manner in which it will be enforced. Most clauses apply to ADMA members. Clauses 2 and 13 however, refer specifically to a 'direct marketer'. Clause 2 states that any person who has a complaint against a direct marketer may refer it to ADMA, while clause 13 provides that the CEO must send the direct marketer a notice containing the decision of the Code Authority within 14 days of the conclusion of the Authority's hearing.
- 8.26 For the provisions of Part F to be effective and result in net benefit to the public, complaints should be able to be lodged, and enforcement action should be able to be taken, against all ADMA members who may breach the provisions of the Code. Part F of the Code should therefore refer to ADMA members rather than direct marketers.
- 8.27 Clause 1 of Part F refers to 'customer complaints' when discussing the referral of unresolved member complaints to ADMA. This may potentially imply that a member complaint can only be referred to ADMA where a contract of sale has been entered into, and the complaint has been generated by an actual customer of the member. As most of the provisions in the Code regulate conduct that takes place whether or not a contract of sale, or relationship between the consumer and the ADMA member, actually exists, the Commission is of the view that Part F should apply to 'consumer' rather than customer complaints.

Coverage

- 8.28 A number of interested parties submitted that the extent of a code's coverage is one of the most important factors in assessing any likely public benefit that arises from the provisions contained in a code. It was recognised that ADMA may have adequate coverage regarding direct mail, but it was submitted that ADMA's coverage with respect to new direct marketing techniques such as e-mail and telemarketing is insignificant. The FSCPC submitted that the test in this case should be an investigation of the volume of direct marketing contacts that will be covered by ADMA's members, including unsolicited mail, unsolicited e-mail and telemarketing. It submitted that the Commission should undertake or commission some independent research on coverage. FSCPC argued that an authorised code that provides inadequate or fractional coverage worsens the position for consumers who may believe that their privacy is protected when, in fact, it is not.
- 8.29 ADMA stated that it is responsible for approximately 80% of annual sales derived from direct marketing techniques and represents over 400 organisations. It submitted that the coverage of its Code extends beyond its actual membership given the fact that its supplier members are involved in most direct marketing campaigns that are undertaken in Australia. It submitted that suppliers have an enormous commercial stake in ensuring that their customers adhere to best practices. ADMA also provided figures demonstrating that of the 40 organisations, who did the greatest number of direct mail campaigns in 1997/98, 30 were ADMA members. It stated that it was safe to assume that virtually all the rest would intersect with ADMA through their use of a member agency, mail house or list broker.

- 8.30 The Commission accepts that, while ADMA members undertake a significant proportion of all direct mail campaigns, they may initiate only a limited number of telemarketing and e-mail direct marketing contacts. It is noted that for a code of conduct to be an effective form of industry regulation, the code needs to have a good coverage of the industry concerned. Some interested parties (ACA and FSCPC) were in fact opposed to ADMA's Code on the basis that it was either a form of industry self-regulation or was not mandatory. The mechanisms by which ADMA's Code can be made mandatory are limited; it needs to be either embodied in legislation, or prescribed under the *Trade Practices Act* or similar state legislation. Whether either of these options is desirable is a matter of government policy. (It is noted specifically in respect of the protection of privacy raised by FSCPC, that the federal Government has announced that private sector privacy legislation is to be introduced which will apply to those industries that have not implemented their own approved privacy regulation. This proposed legislation is further discussed later in this determination.)
- 8.31 The Commission also notes that, in terms of the authorisation test, the wider the coverage within an industry of a code that prescribes satisfactory standards of conduct, the larger the public benefit likely to result from the code. However, a code that prescribes satisfactory standards can still result in public benefit even though it has limited coverage of an industry. Not only will persons dealing with industry participants that are covered by such a code benefit from the code's standards of conduct, but other industry participants may also be encouraged, through competition or in order to avoid government regulation, to adopt standards that are equal to or higher than those prescribed in the code. The Commission concludes that the limited coverage of ADMA's Code with respect to direct marketing contacts by e-mail and telemarketing is not of itself sufficient to satisfy the Commission that the relevant provisions of ADMA's Code may not be granted authorisation. The issue of whether the standards set by ADMA's Code are satisfactory, is discussed later in this determination.

The Rules

- 8.32 The following paragraphs comprise the Commission's consideration of the substance of the rules contained in ADMA's Code. The conclusions that are expressed are based on an assessment of the rules as they would apply once the scope of each of the Parts of the Code has been expanded in accordance with the Commission's requirements as outlined above.

Part B – Standards of Fair Conduct

- 8.33 Part B of ADMA's Code outlines standards of fair conduct relevant to those who engage in the use of direct marketing techniques. It is based on the provisions contained in Part 2 of the Model Code and covers a number of issues including misleading and deceptive conduct, false claims, the information that should be provided to a potential customer at the time an offer is made and the information that should be given at the time the relevant product is delivered. Clauses outlining the rules regarding the offering of incentives, delivery, cancellation of orders and refunds and complaint handling procedures are also included.

- 8.34 Many of the clauses contained in Part B reflect legislative provisions that are enforceable in court. For example, clauses 1, 2 and 9 prohibit direct marketers from engaging in misleading and deceptive, or unconscionable, conduct. These are mandatory standards that are prohibited by the Trade Practices Act or State and Territory fair trading legislation, and for which anyone can be taken to court if they are thought to be in breach. Given that direct marketers are required by law to comply with such standards in the absence of ADMA's Code, agreement by ADMA members to comply with such standards reflected in the Code (ie, comply with the law) is not anti-competitive. Other clauses contained in Part B set minimum standards that go beyond what is required by law, for example, clauses requiring delivery of goods and services within 30 days and providing for a cooling off period of seven days or more. Through their imposition of minimum standards, these clauses have the potential to standardise the way in which participants in the direct marketing industry conduct their business and therefore may result in anti-competitive detriment, if the subject of adequate enforcement.
- 8.35 Direct marketing and distance selling methods have many specific characteristics that cause them to differ from shop-front retailing. The nature of sales using such methods mean that consumers will often not have the opportunity to inspect the relevant goods prior to entering into the purchase contract, or may not have sufficient opportunity to research the goods and services that are being offered by the seller. Those clauses that expand on the law by, for example, providing for information disclosure requirements and the introduction of a seven-day cooling off period, have the potential to ensure that consumers of goods and services are provided with adequate information about both their rights and purchases. Where appropriate, they also provide consumers with the additional protection of being entitled to a refund within seven days of the direct marketer receiving the returned goods or notice of the cancellation of the contract from the customer. Potential public benefits therefore result from the prescription of such minimum standards. While the Commission acknowledges the concerns expressed by some interested parties with respect to the breadth of exemptions to the cooling off period, it is noted that these exemptions are no broader than those contained in the Model Code.
- 8.36 The Commission considers, however, that clause 17 of Part B of ADMA's Code, which deals with delayed delivery of ordered goods or services, requires clarification. The Commission requires the last sentence of the clause to be amended to provide as follows – 'This notification must be accompanied by a reply-paid or other cost free response mechanism and include an option for the customer to cancel the order and receive a full refund of any money paid.'
- 8.37 While those provisions that reflect the law do not add to the level of protection that consumers are already entitled to, they will result in public benefit if they encourage compliance with the law and are the subject of efficient complaint or dispute resolution procedures. The promulgation of effective complaint handling procedures contributes significantly to a scheme's ability to deliver public benefit. Quick and inexpensive dispute resolution procedures benefit the public through resolving consumer concerns and taking pressure off the courts. They also provide a mechanism through which industry is able to identify problem areas and take steps to rectify them, in addition to facilitating better business practices and the provision of

higher quality goods and services. The effectiveness of the ADMA complaint handling mechanisms is discussed later at paragraphs 8.88 to 8.91.

Part C – Telemarketing

8.38 Part C of ADMA's Code sets down standards of fair conduct that relate specifically to the technique of telemarketing. Clauses 1 –3 outline procedures that a telemarketer must follow with respect to the provision of identification information. Clause 4 outlines the information that the telemarketer must provide to customers who request it. Clause 6 provides that a telemarketer must not represent that they are undertaking market research where the purpose of the call is to sell a good or service, while clauses 7 and 8 outline acceptable calling conduct. The provisions contained in Part C are largely based on those contained in Part 3 of the Model Code of Practice.

8.39 Interested parties criticised Part C on the following grounds:

- where a service bureau makes a call on behalf of a direct marketing organisation, it should be required to identify itself as well as the organisation on whose behalf it is making the call;
- the term 'telemarketer' should be defined;
- the permitted calling times are too generous; and,
- if an individual requests that they receive no further calls in relation to a campaign, that request should be honoured indefinitely.

8.40 ADMA did not address these concerns in its submissions to the Commission.

8.41 On the issue of definition of the term 'telemarketer', the Commission has concluded (see paragraph 8.14 above) that ADMA should adopt the equivalent of the Model Code's definition of 'direct marketer', which includes by reference the Model Code's definitions of 'direct marketing', 'telemarketer' and 'telemarketing'. The Commission has also concluded (see paragraph 8.18 above) that the provisions of Part C should extend not only to direct marketers (so defined) but also to fundraisers and charities.

8.42 The PC in particular has expressed concern that where a service bureau makes a call on behalf of a direct marketer, it should be required to identify itself as well as the direct marketer on whose behalf it is making the call. (The PC has raised this same concern in respect of clause 5 of Part E of ADMA's Code, see paragraph 8.69 below.) ADMA has advised that there would be compliance problems with such a requirement. The Commission notes that the relevant provision of the Model Code requires telemarketers to identify themselves, the direct marketer they represent, and advise the purpose of the call. However, clause 1 of Part C of ADMA's Code requires a direct marketer to ensure the following information is provided to the customer – the name of the person making the telephone call; where a service bureau is making the call, the name of the organisation on whose behalf the call is being made; and the

purpose of the telephone call. ADMA has advised that for practical reasons such as clarity and brevity of the introduction, when the call is made by a service bureau, the individual making the call would identify him/herself, but not the service bureau, and the organisation on whose behalf the call is being made. Clause 1 of Part C thus reflects industry practice. The Commission considers that the issue of appropriate disclosure of identification information in telemarketing calls where made by a service bureau, and the compliance problem raised by ADMA, should be the subject of further discussion between ADMA and the PC. The requirements of clause 1 of Part C of ADMA's Code should be reconsidered, in the light of such discussions between ADMA and the PC, as part of the first review of ADMA's Code.

- 8.43 The Commission recognises that telemarketing, as a technique, gives rise to special problems. Issues of intrusion upon an individual's private space, as well as concerns regarding the quality of information that consumers receive about the product that is being marketed, and their recourse to a resolution mechanism for complaints about either the product or the telemarketing activity itself are relevant. The Commission is satisfied that the provisions contained in Part C of ADMA's Code dealing with the provision of information, acceptable calling conduct, line disconnection times and calling frequency have the potential to address these problems.
- 8.44 The clauses of Part C concerning the provision of identification information and information to be provided on request potentially ensure that a consumer is given adequate information so that they have some recourse in the event of a complaint concerning the conduct of a telemarketer. The Commission is also satisfied that those clauses of Part C that require direct marketers, fundraisers and charities to consider the convenience of the customer, limit the times when they contact customers and release a customer's telephone line within 5 seconds of the customer hanging up, will contribute to the protection of the customer's right to privacy and to not be intruded upon in their home or workplace.
- 8.45 The Commission notes, however, the concerns of a number of interested parties regarding the span of permitted calling times contained in clause 9 of Part C. This span is drawn from the span of hours included in the Austel Privacy Advisory Committee (APAC) Report 'Telemarketing and the Protection of the Privacy of Individuals' which states that:

Without an individual's consent an organisation should not use the telephone or ACE [automatic calling equipment] to contact the individual before 8am or after 9pm local time at the individual's location or on Christmas Day, Good Friday or Easter Sunday.'

The same span of hours was included in clause 56 of the Model Code.

- 8.46 The Commission notes that the more restrictive are the permitted calling times of ADMA's Code, the greater is their anti-competitive effect through the resulting standardisation of ADMA members' behaviour. On the other hand, the Commission recognises that there is public benefit in establishing an industry minimum standard with respect to permitted calling times. Such a standard contributes to the protection of consumers' privacy and minimises intrusion upon their personal space. The Commission agrees with interested parties that the permitted calling times of ADMA's Code are generous. Consequently, this provision of the Code is likely to have minimal anti-competitive effect, but is also likely to result in relatively little

benefit to the public. On balance the Commission considers that the provision is likely to result in net public benefit. It is noted that the permitted calling times adopted by ADMA have been endorsed through the Model Code process by the MCCA. The Commission would expect that interested parties will again raise the issue of permitted calling times when the Model Code is being reviewed.

- 8.47 The NSWPC submitted that if an individual requests that they receive no further calls in relation to a campaign, that request should be honoured indefinitely. Mr Robin Whittle of First Principles further submitted that direct marketing approaches, where they are not wanted, impose costs on consumers and businesses. These costs include tying up telecommunications services, the cost of receiving e-mails and faxes, staff time wasted, and the disruption to work and concentration. These submissions raise issues relating to the adoption of adequate procedures whereby consumers can communicate their desire not to receive direct marketing approaches, which are discussed later at paragraphs 8.72 to 8.82.
- 8.48 In January 1999 the Commission received a joint submission from FSCPC and the Australian Telemarketing and Call Centre Association (ATCCA), which has 1100 members including most banks, non-bank financial institutions, telemarketing bureaus, commercial and charitable organisations. They advised that ATCCA is developing, in close consultation with consumer representative organisations, a new code of conduct that will cover all aspects of telecommunications based communications between its members and consumers. They expressed concern at the damage that could potentially be caused by the premature authorisation of ADMA's Code, which purports to cover activities like telemarketing and e-mail marketing, but which sets relatively low standards of consumer protection, and only provides limited industry coverage.
- 8.49 As noted above, the Commission considers that Part C of ADMA's Code sets standards of conduct for telemarketing that are likely to result in net public benefit. As also noted, the provisions of Part C are based on Part 3 of the Model Code, which has been endorsed by the MCCA. It can thus be concluded that the MCCA also does not consider that Part C of ADMA's Code sets inappropriate standards of conduct for telemarketing. On the issue of industry coverage, the Commission has concluded (see paragraph 8.31 above) that the limited coverage of ADMA's Code with respect to direct marketing contacts by telemarketing is not of itself sufficient to satisfy the Commission that the relevant provisions of ADMA's Code may not be granted authorisation. Further, the Commission does not consider that its authorisation of ADMA's Code will prevent other industry associations from developing their own codes of conduct, including codes that prescribe higher standards of conduct where an association assesses that this is desirable to better address industry problems or consumer concerns.

Amendments to the Model Code

- 8.50 Throughout the authorisation process ADMA has referred to the fact that provisions contained in Parts B and C of its Code are drawn from the Model Code. As discussed above, the Model Code was the subject of a lengthy consultation process and received the endorsement of the MCCA. Clause 66 of the Model Code states that a working

party established by the MCCA will review that Code three years after it is released and at periodic intervals thereafter. The MCCA has thus recognised that independent reviews are important to ensure, that the regulatory standards of the Model Code remain appropriate in light of current market practices and community expectations, and that the Model Code continues to receive MCCA endorsement.

- 8.51 As noted in paragraph 2.9 above, when the Model Code was released the MCCA encouraged industry associations whose members were involved in direct marketing to establish their own codes based upon the provisions contained in the Model Code. The Commission concludes that for ADMA's Code to continue to result in benefit to the public its provisions should be kept up-to-date with regulatory developments as reflected in the Model Code. The Commission therefore requires as a condition of authorisation that, within four months of changes being made to the Model Code, ADMA demonstrate to the satisfaction of the Commission, either that its Code has been amended to adequately reflect such changes or why it would not be appropriate for such changes to be reflected in its Code.

Part D – Fair conduct relevant to electronic commerce

- 8.52 Part D of ADMA's Code contains provisions outlining conduct with respect to electronic commerce. The Commission notes that Part D of the Code has been subject to more critical comment from interested parties than any other Part of the Code. ADMA states that Part D is based on the Draft Recommendation of the Council Concerning Guidelines for Consumer Protection in the context of Electronic Commerce that was released by the OECD in 1998. The Model Code does not include provisions on electronic commerce.
- 8.53 Most of the concerns raised by consumer and privacy advocates with respect to Part D related to the principle of equivalent protection that is endorsed by clause 1. The ACS, Dr Clarke of XC and EFA argued that there were a number of special considerations that needed to be made with respect to electronic commerce, as distinct from other forms of commerce. These considerations included the following.
- The receipt of unsolicited commercial e-mail ('spam') can be more costly for consumers and business due to the ability of senders to incorporate substantial data and video attachments that increase the time taken to read and delete e-mail and has the capacity to clog up e-mail systems. This means that in circumstances where a person is only able to receive a limited amount of e-mail, solicited mail may be blocked due to the fact that the user has received unsolicited mail. The receipt of such e-mail may also impose financial costs upon receivers where they are charged on the basis of the volume of information that they receive.
 - Determining the identity of the people who are communicating via e-mail is made more difficult given that e-mail accounts may be controlled by more than one person. Resolution of disputes may also be difficult where there is no physical location of the business, or it is too distant from the consumer to enable the easy return of goods.

- There is increased potential for the misuse of information due to the fact that consumers are usually required to display their e-mail address or provide their credit card details.
- 8.54 In its submission dated 22 June 1999 FSCPC advised that clause 1 of Part D, which provides customers with 'the same level of protection' for electronic commerce as for other forms of commerce, mirrors an early draft of the OECD guidelines and is now out of date. It noted that Australia argued in its August 1998 submission to the OECD that the words 'at least the same level of protection' be included. FSCPC advised that the December 1998 version of the OECD guideline was altered and the words 'at least' included in the relevant clause.
- 8.55 However, the Commission notes that the latest draft of the OECD guidelines distributed by CAD on 8 July 1999 provides that consumers should be afforded an 'equivalent' level of protection (or alternatively, 'comparable protection') to that afforded through other forms of commerce. The current OECD draft guideline thus provides for 'equivalent' protection for consumers involved in electronic commerce. However, the Commission notes that Australia has in the past argued that the OECD guideline should not prevent the implementation of a level of protection to consumers who participate in electronic commerce that exceeds that applicable to other forms of commerce.
- 8.56 FSCPC further submitted that the current version of the OECD draft guidelines contained some 40 specific provisions, none of which are contained in ADMA's Code. FSCPC noted, that clause 2 of Part D only repeats the preamble to a much longer and more detailed section of the OECD draft guidelines setting out the information that businesses engaged in electronic commerce must provide. In addition, three of the most important sections of the OECD draft guidelines, dealing with requirements for online advertising, marketing and contracts and the definition of electronic commerce, are not in ADMA's Code. FSCPC also noted that;
- Clause 3 of Part D is a four line summary of about four pages of detailed provisions regarding the requirements for online contracts, and makes no sense as a stand alone sentence.
 - Clause 4 is merely an 'aspirational' statement, suggesting that at some time in the future online complaints systems might be developed.
 - Clause 5 is merely a link to Part E of ADMA's Code.
 - Clause 6 is a meaningless motherhood statement that is completely out of place in the Code.
- 8.57 FSCPC disputes that public benefit could possibly result from the six clauses of Part D. It submits that all Part D does in its current form is entrench opt-out as the standard for avoiding spam.
- 8.58 ADMA submitted that as well as being based on the OECD draft guidelines, the standards contained in Part D were consistent with the Consumer Protection in Electronic Commerce Principles prepared by the (Australian) National Advisory

Council on Consumer Affairs that were released in April 1998. Given the cross-border nature of e-commerce, ADMA submitted that it was particularly important that ADMA members adhere to international best practice. ADMA acknowledged, however, that the OECD draft guidelines are a work in progress.

- 8.59 On the issue of the current status of the OECD draft guidelines and whether ADMA should be required as a condition of authorisation to amend its Code to reflect changes to these guidelines, Treasury's Consumer Affairs Division (CAD) noted that the guidelines have been through a number of drafts and are not due to be finalised before the end of 1999. While CAD supported the need for ADMA to keep in step with the OECD guidelines it considered that to require ADMA to amend its Code to reflect each draft of the OECD guidelines, as well as inform its membership, would impose a significant compliance burden on ADMA. CAD also advised that it is developing a Model Code on Electronic Commerce that will draw, amongst other things, on ADMA's Code and the OECD guidelines. CAD submitted that it would be more appropriate for ADMA's Code to be expected to reflect the Model Electronic Commerce Code, when developed, than to reflect the OECD guidelines which may not be accepted by the Australian government in their entirety.
- 8.60 It is clear that effective ways of regulating this relatively new area of commerce are still being developed, including by other Australian industry associations.
- 8.61 In January 1999 the Commission received a submission from FSCPC advising that the IIA had agreed to consult with consumer and privacy advocates regarding the Internet Industry Code of Conduct. FSCPC again expressed concern at the damage potentially caused by the premature authorisation of ADMA's Code which had been so heavily criticised and which falls short of acceptable consumer standards. In a further submission received in March 1999, FSCPC advised that IIA had suspended those parts of its Code dealing with spam. IIA had consulted with its members and a majority favoured an opt-in, rather than an opt-out or hybrid, approach to spam. Accordingly, IIA was amending its Code to introduce an opt-in regime. FSCPC noted that consumer and privacy advocates had argued strongly that the ADMA approach to spam and electronic commerce should not be supported as this would damage the momentum towards more consumer-friendly proposals such as opt-in systems. It urged the Commission to reconsider those aspects of the ADMA Code.
- 8.62 The CAD in its submission dated 24 June 1999 noted that given the IIA's members are largely comprised of internet service providers, it is hardly surprising that they have favoured an opt-in approach. Given that most internet service providers' corporate clients are charged a flat rate for unlimited access, profit margins for these service providers are greatest at lower levels of internet traffic. This position directly contrasts such service providers with ADMA's members who need a large pool of customers in order to obtain the necessary economies of scale to make direct marketing profitable.
- 8.63 The Commission accepts that electronic commerce does give rise to specific problems that need to be the subject of special regulation. Earlier this year the Commission's Chairman called for the development of an electronic code of commerce but noted that the first step was to finalise an international code. The Commission notes that the OECD guidelines are still in draft form, have undergone relatively frequent

amendment, and are not due to be finalised until late 1999 at the earliest. Although ADMA claims that Part D of its Code is based on the OECD draft guidelines, the Commission notes that the current provisions of Part D do not adequately reflect the current provisions of these guidelines. This is perhaps not surprising in view of the draft status of the guidelines and the relatively frequent changes made to them.

- 8.64 The Commission considers it is important that Part D of ADMA's Code continues to reflect international regulatory standards, particularly those supported by the Australian government, for the public to benefit from the provisions of Part D. ADMA could no doubt update the provisions of Part D so that they adequately reflect the current provisions of the OECD draft guidelines, however, further updates may well be necessary until such time as the OECD guidelines are finalised. The Commission concludes that the provisions of Part D of ADMA's Code are likely to result in public benefit provided these provisions are amended to reflect the OECD guidelines. The Commission therefore requires as a condition of authorisation that, within four months of the OECD guidelines (including new editions of the guidelines) being finalised, ADMA demonstrate to the satisfaction of the Commission either that its Code has been amended to adequately reflect the guidelines or why it would not be appropriate for the guidelines to be reflected in its Code.

Part E – Fair conduct relevant to consumer data protection

- 8.65 Part E of ADMA's Code outlines the procedures that direct marketers must follow with respect to the information that they compile from customers, and is based on the NPPs. The NPPs are based on OECD standards, and were developed by the PC in consultation with business, government, community, consumer and privacy groups. Part E is not reflected in the Model Code. At the time the Model Code was released the government was considering the implementation of private sector privacy legislation, and the NPPs had not been finalised.
- 8.66 Both the PC and Attorney-General's department supported ADMA's adoption of the NPPs, although the PC also made some suggestions as to how the public benefits flowing from the implementation of the NPPs could be improved. However, some interested parties expressed concerns about the provisions contained in Part E. Many of the concerns related to the scope of the Part which was discussed above at paragraphs 8.20 – 8.24, other concerns related to the detailed content of the provisions. The primary concern with respect to the latter appeared to be ADMA's alleged failure to adapt the NPPs to deal with some of the specific problems arising from the use of direct marketing techniques. The following are some of the main criticisms received from interested parties.
- Clauses should be included in the Code requiring direct marketers to provide consumers with information, if requested, on whether personal information will be used for list rental and about where a direct marketer has obtained personal details.
 - In the context of telemarketing, the PC considered that clause 5 of Part E should be amended so that the identity of the organisation making the call,

whether that is a service bureau or the principal marketer itself, should always be disclosed.

- The number of circumstances in which a direct marketer can deny consumers access to their personal information should be narrowed.
- The Code should be amended to require the removal of personal information from lists.

- 8.67 On the issue of removal of personal information from lists, the Commission notes that clause 34 of Part E requires a direct marketer to remove a consumer's name from all internal marketing lists or lists for transfer to a third party at the request of the consumer. In addition, the Commission is to require as a condition of authorisation that ADMA empower the Code Authority to order correction or deletion of relevant records and personal information as a remedy for breach of ADMA's Code (see paragraph 8.106 below).
- 8.68 It is noted that clause 3.4 of Part E requires a direct marketer, when collecting personal information from the subject of the information, to take reasonable steps to ensure that the subject of the information is aware of to whom (or the types of individuals or organisations to which) it usually discloses information of this kind. Clause 18 of Part E requires a direct marketer, on request, to take reasonable steps to inform individuals, generally, what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses that information. The Commission considers that these clauses will ensure that a direct marketer would be required to inform an individual, on request, whether or not the individual's personal information will be used for list rental. The direct marketer will also be required to inform an individual how it collects such information. In addition, ADMA advised the Commission, in consultations following the pre-decision conference, that Part E is to be amended to require members, on request, to disclose the source of an individual's personal information. The Commission also notes that under clause 4.4 of Part C a telemarketer must, if requested, provide details of the source from which the telemarketer obtained a customer's personal information.
- 8.69 The Commission notes the PC's view that a direct marketer collecting personal information over the telephone from the subject of the information should always be required to disclose the identity of the organisation making the call, whether that is a service bureau or the principal marketer itself. ADMA's view that requiring a service bureau to identify both itself and the direct marketer on whose behalf a call is being made will cause compliance problems in practice has been noted at paragraph 8.42 above. As noted in that paragraph, the Commission considers the issue of appropriate disclosure of identification information in telemarketing calls when made by a service bureau, and the compliance problem raised by ADMA, should be the subject of further discussion between ADMA and the PC. The requirements of clause 5 of Part E of ADMA's Code should be reconsidered, in the light of such discussions between ADMA and the PC, as part of the first review of ADMA's Code.
- 8.70 The Commission notes that the number of circumstances under clause 19 of Part E in which a direct marketer can deny consumers access to their personal information are based on the NPPs. The Commission does not consider these exemptions will have

any significant detrimental effect on the public benefit likely to result from the implementation of Part E.

- 8.71 The provisions contained in Part E place limitations on the ability of direct marketers, fundraisers and charities to collect, use and disclose personal information and the types of information that can be collected. If the subject of adequate compliance, they will also ensure that the information collected is accurate, complete and up to date. Security of information and access for consumers is also provided for. To the extent that these provisions are the subject of adequate compliance, it is the Commission's view that they contribute to the protection of consumer privacy and are therefore likely to deliver public benefit.

ADMA's Do Not Call/Do Not Mail services

- 8.72 Clause 33 requires relevant ADMA members to use the Do Not Mail / Do Not Call services of ADMA when conducting a direct marketing campaign, in order to remove the name of any consumer, other than a current customer, who has requested that they not receive direct marketing approaches. A current customer is defined as any customer who has made a purchase within the last six months or during a normal selling cycle.
- 8.73 ADMA advised that the following procedures are available to consumers who wish to opt-out of receiving further direct marketing communications from its members. ADMA members who are sending unsolicited direct marketing material to a consumer for the first time are required to include a direct response component that allows consumers to opt out of receiving further marketing communications from that member. If consumers advise the member that they do not wish to receive marketing communications from the member, the member must remove the customers' details from its lists. In addition, consumers are able to opt-out of receiving marketing communications either from specific ADMA members or from all members generally by calling a 1800 number provided by ADMA or by accessing ADMA's web site. The consumers' details are then entered on to a database that is circulated on computer disk to all ADMA members. Members must run the consumers' names against all of their marketing lists and the names included on the opt-out list will be flagged and 'suppressed' if the consumer is not a current customer. Names are suppressed for a period of two years.
- 8.74 Interested parties criticised clause 33 on the grounds that a customer's expressed preference not to receive unsolicited marketing approaches should not be overridden because the customer chooses to purchase goods and services. It was argued that ADMA should be required to show cause for ceasing to respect preferences after a particular period and that the opt-out lists should be maintained by a third party. ADMA did not comment on these criticisms.
- 8.75 The Commission is of the view that public benefit is likely to result from a cost-free system that ensures consumers who do not wish to receive unsolicited direct marketing approaches are not targeted by direct marketers, fundraisers or charities. Such a system would require a high level of industry compliance achieved through effective administration and enforcement, and a high level of consumer awareness achieved through appropriate industry promotion of the system.

- 8.76 The Commission notes that while clause 33 of Part E of ADMA's Code requires direct marketers to utilise ADMA's opt-out system, none of the details of the system or the manner in which it should be used by direct marketers or consumers are included in the Code. The Commission considers that the opt-out procedures outlined in paragraph 8.73 above, including the obligations of ADMA and its members and the rights of consumers under the opt-out system should be included in ADMA's Code.
- 8.77 Some interested parties have expressed concern over the 'current customer' exception from ADMA's Do Not Mail/Do Not Call service, ie, a direct marketer need not remove the name of a person registered on the service if that person has made a purchase from the marketer within the last six months or during the normal selling cycle. However as noted above, the Code (clause 34) does provide a separate means by which a 'current customer' of a direct marketer's may have his/her name removed from the marketer's list.
- 8.78 Some interested parties also argued that ADMA should be required to show cause for ceasing after a period of time to respect consumers' requests not to receive marketing communications from ADMA members. It is noted that under ADMA's Do Not Mail/Do Not Call service a person's opt-out preference is required to be suppressed by ADMA members for a minimum of two years. ADMA has advised that when a person registers under this service, his/her name, address and telephone number (as advised by the person) is recorded in ADMA's opt-out data base and that information remains on the opt-out data base for a period of two years. Thus a person who wishes to remain registered on ADMA's Do Not Mail/Do Not Call service will need to re-register every two years.
- 8.79 ADMA advises that a person's name, address and telephone number remain on the opt-out data base for two years only, in order to ensure that the data base details are accurate and that the data base continues to reflect consumers' preferences. ADMA advises that on average, persons change their address and/or telephone number relatively frequently, around every two years. If a person on ADMA's opt-out data base changes his/her address or telephone number and does not advise ADMA, then the data base is no longer accurate and that person may begin receiving marketing material from ADMA members via his/her new address or telephone number. Hence a person's name, address and telephone number as advised by the person remain on ADMA's opt-out data base for two years only. ADMA noted that consumers are advised when they register under the Do Not Mail/Do Not Call service via ADMA's 1-800 telephone number that the registration is for a two year period. ADMA also advises that such information is to be included on the Do Not Mail/Do Not Call registration forms which ADMA distributes through fair trading offices and by other means.
- 8.80 The Commission considers that the accuracy of ADMA's opt-out data base is important to the public benefit likely to result from its Do Not Mail/Do Not Call provisions of ADMA's Code. Retaining a person's name, address and telephone number on ADMA's opt-out data base for two years only, should help to ensure the accuracy of the data base. Provided consumers who use the Do Not Mail/Do Not Call service are aware that they will need to re-register every two years, and provided such registration is simple and cost-free, this requirement would not appear to detract from the public benefit likely to result from the Code's Do Not Mail/Do Not Call provisions.

- 8.81 As noted, the onus rests with consumers who do not want to receive unsolicited marketing material to take advantage of the opt-out services offered by ADMA and its members. In order for these services to deliver public benefits through use it is essential that they are easily accessible and that consumers are aware of these services. The Code does not provide for, or require, any promotion of the opt-out system. The Commission considers that ADMA should be required to promote consumer awareness of its opt-out system through its publications, its promotions of the Code, its web site and when responding to consumer inquiries or complaints. ADMA should also report annually to the Commission of its initiatives to promote awareness of its opt-out service. These arrangements should address concerns expressed by interested parties that consumers are made aware of their ability to opt out of receiving further marketing communications.
- 8.82 The Commission notes the concerns expressed by interested parties regarding the independence of the body responsible for maintaining ADMA's opt-out lists. While ideally it may be desirable that such lists are maintained by an independent third party, no evidence or other information was provided indicating that the maintenance of opt-out lists by ADMA and its members has resulted in an abuse of the opt-out system by ADMA members, or has resulted in consumers being unwilling to use the system.

Implementation of private sector privacy legislation

- 8.83 In December 1998 the federal government announced its intention to introduce 'light touch' privacy legislation. It is the Commission's understanding that the government proposes that the legislation will act as a support to industry self-regulation of privacy, and will be based on the NPPs. It is proposed that the legislation will apply to those industries that have not implemented their own approved privacy regulation and will set down a process by which industry self-regulation can be assessed and approved if appropriate.
- 8.84 The Commission notes that the NPPs will therefore be the subject of parliamentary review, and that Part E of ADMA's Code will be assessed in accordance with statutory procedures laid down by legislation. For a code of practice to deliver public benefit the Commission is of the view that it must, at an absolute minimum, reflect legislative standards. In these circumstances the Commission requires that ADMA, as a condition of authorisation, amend its Code to reflect any legislative privacy standards, or such standards that are endorsed by the Commonwealth parliament or government body responsible for private sector privacy regulation, within four months of the legislation being passed or the regulation being adopted.
- 8.85 The PC has expressed support for this condition and advised that once the privacy legislation is in place existing codes may need to be reviewed so as to ensure that they properly embody the ideals underlying the legislative scheme. APCC considered that the condition appeared desirable, but it had doubts about whether the Commission's requirements could override the longer statutory timeframe for compliance, and for code approval, which is likely to be included in the privacy legislation. The Commission notes that failure by ADMA to comply with the condition of authorisation under the Trade Practices Act would give the Commission grounds to revoke the authorisation, but would not, of course, be relevant as to whether or not there was a breach of the privacy legislation. In the absence of any submission that

the timetable for compliance specified in the condition of authorisation is inappropriate, the Commission sees no reason to change the condition.

- 8.86 APCC also expressed concern that ADMA's Code should deal with the application of NPPs 1 and 2 (covering collection, and use and disclosure) to direct marketing in a more detailed way than either the NPPs do or the legislated version is likely to do. APCC considered it an evasion of responsibility for the Commission to deal with criticisms of the way the NPPs are to be interpreted simply by deferring to the privacy law reform process. The Commission notes that its role in considering ADMA's Code under the authorisation process is to assess whether the relevant provisions of the Code are likely to result in net public benefit. The Commission is of the view that provisions of ADMA's Code that comply with the proposed privacy legislation (as will be required under the Commission's condition of authorisation) are likely to result in net public benefit, particularly since a requirement by ADMA that its members comply with the law would not be anti-competitive.

Compliance

- 8.87 As discussed above, it is the Commission's view that compliance with the provisions of ADMA's Code is essential in order for the realisation of public benefits to take place. However, the provisions also restrict the conduct in which ADMA members can engage. Increased compliance will have the potential to standardise the way in which participants in direct marketing conduct their business. The Commission is of the opinion that any anti-competitive detriment arising from increased compliance with the rules contained in ADMA's Code is likely to be more than outweighed by the public benefits resulting from such compliance.

Complaint handling at the business level

- 8.88 Clause 1 of Part F of ADMA's Code provides that the scope of ADMA's enforcement procedures will be limited to alleged breaches of the Code. It will not include mediation of consumer complaints that would normally be dealt with by a member's internal complaints handling process. Clause 40 of Part B of ADMA's Code requires direct marketers to adopt a customer complaint resolution procedure which complies with the Australian Standard for Complaints Handling AS 4269⁵.
- 8.89 Standard AS 4269 was prepared by the Standards Australia Committee on Complaints Handling in response to a request for assistance from the business community. Its objectives include the provision of a complaint handling process for those making and receiving complaints and to serve as a reference document on current best practices for handling complaints. Section 2 of the Standard sets out the essential elements of effective complaints handling. These include commitment, fairness, resources, visibility, access, assistance, responsiveness, charges, remedies, data collection, systemic and recurring problems, accountability and reviews. Section 3 of the Standard provides guidance on the ways in which business can implement a complaint handling scheme so that it complies with the essential elements, while section 4 contains complaint handling guidelines.
- 8.90 Section 5 of AS4269 deals with disputes in recognition that many complaints are not resolved at the business level, with Clause 5.2 providing that where a solution to a complaint cannot be found after more than one attempt further procedures and remedies are available. ADMA's Code requires that customer complaints involving an alleged breach of the Code which are not resolved under a member's internal complaints handling process must be referred by the member to ADMA as a customer complaint under Part F.
- 8.91 The Commission considers that the public is likely to benefit from the implementation, by direct marketers, of internal complaint handling procedures that comply with the principles of AS4269. The Commission also considers that the resolution of complaints by individual direct marketers in accordance with the core provisions of ADMA's Code will enhance compliance with the Code and therefore result in additional benefit to the public.

⁵ Copies of the Standard can be obtained from Standards Australia.

Enforcement of ADMA's Code

- 8.92 Part F of ADMA's Code sets out the procedures for enforcement of the Code. Its provisions can be divided into two categories, those outlining the structure of the enforcement scheme and those detailing the manner in which it operates.

Structure of the scheme

- 8.93 In its draft determination the Commission observed that in order to give rise to public benefits, a code of practice must be supported by a strong enforcement structure. The Commission noted that the enforcement structure contained in ADMA's Code largely relies upon the roles of the Compliance Officer and the Code Authority. The Compliance Officer is the first port of call for complainants and is vested with the power to dismiss a complaint outright if he/she considers there has not been a breach of the Code, or refer it to the Code Authority for further consideration. The Code Authority is the body that bears primary responsibility for enforcing the Code. It has the power to determine whether the investigation of an alleged breach referred by the Compliance Officer should be continued, to conduct a hearing to determine whether a breach has taken place and to require remedial action and recommend some sanctions to the ADMA Board.
- 8.94 If a code of practice does not enjoy public or industry confidence, compliance with its provisions is likely to be low. For such confidence to exist it is essential that the decisions of the bodies responsible for enforcement of a Code are, and are seen to be, objective and unbiased. Objectivity and non-bias is best ensured by provision for an independent decision-maker. The Commission has a number of concerns with respect to the independence of the decision-makers that are responsible for enforcing ADMA's Code.
- 8.95 The manner in which the Compliance Officer is appointed is not outlined in the Code. This officer's independence, or otherwise, is therefore unclear and it is essential that his/her decisions are the subject of appropriate review. Clause 4 of Part F provides that where the Compliance Officer advises the complainant that there does not appear to be a breach of the Code, the complainant may request that the Code Authority review the Compliance Officer's decision. Where the Compliance Officer considers that an ADMA member may have breached the Code, the Officer is required to put particulars of the matter to the member for response (clause 7). Where an ADMA member provides (in response to such a request by the Compliance Officer) clear evidence of acting in compliance with the Code or independently resolves the complaint, the Compliance Officer will take no further action (clause 8). It is noted that under clause 8 the Compliance Officer is not required to establish whether the consumer is satisfied that the complaint has been resolved, or if the consumer agrees that there has been no breach of the Code. In addition, there is no provision of appeal for the consumer, or even the right to be informed of the grounds on which the decision of no further action was made. The Commission considers that where an ADMA member does provide exonerating evidence or the complaint is independently resolved, the Compliance Officer should be required to write to the complainant explaining why the complaint will not be further considered by ADMA. The complainant should also be given the right to request that the Code Authority review the matter.

8.96 In its draft determination the Commission expressed a view that in order for the Code Authority to constitute an independent body it must be comprised of equal numbers of industry and consumer representatives, in addition to the presence of an independent chair. The Commission continues to hold this view. Clause 3.4 of Appendix 1 of the amended Code states that the Authority will consist of:

- an independent chairperson;
- two consumer representatives, being persons with special competence in consumer or industry matters; and,
- three industry representatives, being persons of good character and repute in the direct marketing industry.

8.97 In submitting this amendment ADMA stated as follows:

“... the Code Authority will have equal representation as there will be three parties representing the industry and three persons (including the Chairperson), who are not participants in the direct marketing industry. I also note that the independent chairperson will have a casting vote, which effectively gives the independent members of the Code Authority the greater voice in decision making.”

8.98 Despite this submission, the Commission supports the concerns expressed by CIRS and paraphrased in paragraph 7.34 above. An independent chair cannot substitute for, and should not be viewed as, a de facto consumer representative. In order to guarantee the independence of the Code Authority, it is essential that the interests of both ADMA members and consumers be represented equally, and that there be an independent chair. This is particularly the case given that consumers and members are not provided with an avenue of appeal from decisions of the Authority.

8.99 The Commission is also concerned with the definition of ‘consumer representatives’ contained in clause 3.4.2 of Appendix 1 of the Code, which requires such representatives to be ‘persons with special competence in consumer or industry matters’. The interests of consumers are unlikely to be served by a person who has competence in industry matters only. The Commission is of the view that this definition should be changed to require competence in ‘consumer and industry matters’.

8.100 FSCPC supported the rejection of the words ‘or industry matters’ (which issue, as pointed out by FSCPC, was initially raised by consumer and privacy organisations). However, it queries why such a representative should be required to have special competence in industry matters, and notes that other alternative dispute resolution schemes do not specify such a requirement for consumer representatives. The Commission considers that this requirement should be interpreted broadly, and certainly not as a requirement that the Code Authority’s consumer representatives must have worked in industry. Persons from a range of backgrounds including consumer advocates, lawyers, academics, etc gain detailed knowledge of industry matters through their work and, in the Commission’s view, none should be excluded from the Code Authority by the Code’s definition of consumer representative. Interpreted in this way the Commission considers that the definition should ensure

that appropriately qualified persons, who can enhance the independence and integrity of the Code Authority, are selected as the Authority's consumer representatives.

- 8.101 As noted, ADMA's Code envisages that the Code Authority will have the power to impose remedial action and recommend the expulsion of members, where a breach of the Code is found to have taken place. While the Commission accepts that sanctions are necessary to deter irresponsible conduct and encourage compliance with the Code, where the independence of the decision-making body is not guaranteed there is greater potential for anti-competitive detriment arising from the power to impose sanctions. This is another reason, in addition to those of confidence in and compliance with the Code, to ensure the independence of the Code Authority.

Operation of scheme

- 8.102 The Commission noted in its draft determination that in order for an enforcement scheme to operate effectively, it is essential that both parties to a dispute be given the opportunity to put forward their arguments, rebut the arguments of the other party and be informed of the reasons for any decisions that are made. While ADMA's Code allows consumers and members of the public to lodge a complaint with ADMA, their participation ends once the Compliance Officer receives their complaint. Complainants are provided with no opportunity to put their case to the Code Authority, have access to documents that the Authority will have regard to in reaching its decision, rebut the arguments of the ADMA member or be told the reasons for any decision which is handed down. ADMA has argued that the Code was never intended to provide for a mediation process, stating that members will provide this through their complaint handling procedures. It says that a complaint from a consumer or any other source alleging a breach becomes, in effect, ADMA's complaint with its own member. ADMA anticipates that the Code Authority will be able to effectively deal with many complaints without the need for a formal hearing, and thus argued for flexibility in administration of the Authority's complaint handling process.
- 8.103 The Commission considers that in many cases it will be consumers who are able to best support a complaint alleging a breach of the Code. In order for the Code to operate effectively, consumers will need to have enough confidence in the Code's enforcement to inform ADMA of their complaints. Is the Commission's view this is unlikely to happen in circumstances where consumers have little opportunity to participate in the enforcement process. Further, the Code Authority may consider it useful or necessary for complainants to be present at hearings to assist the Authority's understanding and consideration of complaints. The Commission considers there is merit in providing the Code Authority with flexibility in its handling of complaints and for this reason the Authority should have the discretion to invite complainants to participate in complaint hearings. The Commission considers, however, that whether or not the Authority invites a complainant to participate in a complaint hearing, the complainant should be advised of the reasons for the decision of the Authority following such a hearing.
- 8.104 In its draft determination, the Commission stated that the failure of ADMA's Code to outline the types of remedial action or sanctions that the Authority could recommend, or provide guidelines as to when particular kinds of remedies or sanctions would be

recommended, gave rise to the potential for arbitrariness in its enforcement. The Commission was concerned that this arbitrariness may undermine business and consumer confidence in the Code and give rise to anti-competitive detriment.

8.105 It is noted that clause 17 of Part F of ADMA's amended Code provides that the Authority is empowered to:

- require the member to take specified remedial action to correct the breach and avoid recurrence;
- seek a written undertaking from the member that the breach will not be repeated;
- seek the approval of the ADMA Board to issue a formal written admonition to the member;
- seek the approval of the ADMA Board to publish any such formal written admonition; and
- recommend to the CEO that membership is revoked.

8.106 The Commission notes that this clause does not specify the remedial action that the Authority can require that the member undertake. The Commission views this as a serious deficiency. Consumer confidence in the Code is likely to be low where specific remedies are not provided for. At a minimum, the Commission believes that ADMA's Code should provide for remedies including:

- formal apologies for breach;
- corrective advertising or withdrawal of infringing advertisements or statements;
- correction or deletion of relevant records and personal information; and
- recommendation of refunds or replacement of goods or services where appropriate.

8.107 To ensure independent application of remedies and penalties the Commission is of the view that the Code Authority should have the power to order that members carry out the relevant remedies and to impose all sanctions other than those that concern expulsion from ADMA or admonition by ADMA without reference to the ADMA's Board.

8.108 Various interested parties, including the PC, expressed concern regarding the lack of provision for monetary compensation in the Code. In its submission dated 8 July 1999, the PC submitted that in many cases the compensation involved will amount to no more than 'refund or replacement of goods and services', but compensation should also be available for the actual misuse of the information *per se*. The PC's experience is that compensation would only be paid in a small proportion of complaints and then only in small amounts, but more serious privacy breaches can sometimes inflict

serious financial and social disadvantage on the affected individual. The PC submitted that in such cases financial compensation is the only effective means of redress and it should be provided for in ADMA's Code. In its submission dated 22 June 1999, FSCPC noted that numerous other industry codes provide for monetary compensation, and it will be a requirement of forthcoming privacy legislation. FSCPC considered the lack of monetary compensation to be a very large gap in the sanctions and remedies available under ADMA's Code. The Attorney-General's department observed that it is unlikely the current enforcement provisions of ADMA's Code could operate as an approved complaints handling scheme under the proposed privacy legislation.

- 8.109 The Commission supports these submissions. Consumer confidence in ADMA's Code is likely to be adversely affected if it fails to provide consumers with the opportunity to obtain compensation for any financial or other loss that they may incur as the result of an ADMA member breaching the Code. ADMA has advised that it will consult with other industry sectors and self-regulatory schemes to establish the viability of schemes involving fines and monetary compensation where a consumer suffers financial or other loss as a result of an ADMA member breaching the Code. The Commission is of the view that the issue of providing for monetary compensation in the Code should be considered as part of ADMA's first review of the Code. It is noted that if, as expected, the provision of monetary compensation is to be a requirement for the approval of codes under the proposed privacy legislation, then ADMA's Code will be required to provide for such compensation under the condition of authorisation discussed at paragraph 8.84 above.
- 8.110 The Commission's concerns regarding the deficiency of ADMA's Code in respect of remedies are heightened given the approach that ADMA has taken with respect to the imposition of sanctions. Clause 18 of Part F of the Code provides that the Authority may only recommend issuance of a formal written admonition where the breach is of a serious nature and has occurred more than twice in the preceding 12 months. Clause 19 states that publication of a formal written admonition, or revocation of membership can only be recommended where the member has committed multiple breaches of the Code over an extended period of time and demonstrated an ongoing disregard for the Code. Sanctions, it appears, will only be recommended in the most serious of cases, their value as incentives for compliance by members is therefore diminished substantially. The Commission requires that clauses 18 and 19 of Part F be deleted as a condition of authorisation of ADMA's Code.

Administration

- 8.111 Part G of ADMA's Code sets out the manner in which the Code will be reviewed and amended. Clause 1 provides that it will be reviewed one year after it has been adopted and every three years thereafter. Clause 2 vests the Code Authority with the responsibility of conducting the review. Clause 4 provides that the Board may resolve to amend the Code after receiving recommendations from the Authority.
- 8.112 Part 5 of the Model Code states that a code administration body should administer the Code. It goes on to provide guidance on the establishment of an administration plan, how the membership of the administration body should be structured and how often the body should meet.

- 8.113 Interested parties were highly critical of the fact that any review of the ADMA Code would be conducted by the Code Authority, it was submitted that the Authority would, in effect, be reviewing itself, therefore a separate independent body should be established. It was noted that the Model Code (clause 61) required an independent dispute resolution mechanism for consumer complaints, that meets the *Benchmarks for Industry-Based Consumer Dispute Resolution Schemes*⁶ (the *Benchmarks*) and that is 'effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.'
- 8.114 The Commission notes that the *Benchmarks* provide for a decision-maker that is responsible for the determination of complaints. Where the decision-maker consists of a panel of individuals, only the chairperson is required to be independent of industry or consumer interests. This allows the industry to be represented on the decision-making entity as long as the balance between consumers and industry is maintained. In addition to the decision-maker, the *Benchmarks* provide for a separate entity (comprised of consumer, industry and other stakeholder interests) set up to oversee the independence of the dispute resolution scheme. The *Benchmarks* further provide for the scheme to be reviewed by an independent party commissioned by the overseeing entity. (The preface to the *Benchmarks* note that they are meant to act as a guide, but their use by all consumer dispute resolution schemes was encouraged.)
- 8.115 In addition to requiring an independent dispute resolution mechanism for consumer complaints that meet the *Benchmarks*, the Model Code also provides for a code administration body based on the guide on codes of conduct - *Fair Trading Codes of Conduct, Why have them and How to prepare them*⁷. The Model Code provides that the code administration body should include an independent chair, and an equal number of industry and consumer/community representatives, and that its role should include conducting periodic reviews of the effectiveness of the code and its procedures and recommending amendments if necessary.
- 8.116 The Commission recognises that a code must be subject to review to ensure that it is achieving its goals, continuing to operate effectively and keeping up to date with developments occurring within the industry. This is particularly true in the case of ADMA's Code given the developments that are likely to occur in the privacy and electronic commerce areas. Reviews are important not only to ensure that the industry regulation provided under the code's provisions remains appropriate, but also to assess compliance with the code and the effectiveness of the code's sanctions, complaint handling and dispute resolution processes. As noted above, both the Model Code and the *Benchmarks* provide that reviews should be undertaken by an independent body that is not the same independent body that is responsible for adjudicating on complaints and disputes.
- 8.117 The Commission considers that for net public benefit to continue to result from ADMA's Code, the Code must be subject to independent review on a regular basis and that such reviews should not be undertaken by the Code Authority in view of its responsibility for adjudicating complaints under the Code. The Commission

⁶ This document was released in August 1997 by the Minister for Customs and Consumer Affairs.

⁷ This guide, published in October 1996, was developed by Commonwealth, State and Territory consumer affairs agencies and approved by the Ministerial Council on Consumer Affairs.