

4. CASE STUDY: SELF-REGULATION IN DIRECT MARKETING

4.1 INTRODUCTION

Unlike advertising, direct marketing involves direct communication between a firm and its target customers to generate a response or transaction. Direct marketing also involves the use of a much wider range of different forms of communication than advertising. These include mail (direct mail/catalogues), telephones (telemarketing), the traditional broadcast and print media (direct response advertising via television, radio, newspapers and magazines), and new electronic media (the Internet, 'Kiosks').

Central to all direct marketing to existing customers is the use of a database that contains, at the very least, their names and addresses or telephone numbers. More sophisticated databases can contain information on the previous purchases made by the consumer, their preferences and financial status.

Direct marketing firms trying to reach new customers often rent lists containing the contact details of people whose demographic characteristics, or purchase habits, suggest they could be a prospective customer. For example, a list of subscribers to a ski magazine might represent a potential market for a sports clothing catalogue. These lists commonly contain thousands of names. When direct marketing firms rent a list they are interested in the particular characteristics shared by people on that list.

The names on a list become important individuals to the firm only when those individuals reply to an offer and become customers. Once this occurs, good direct marketing firms seek to serve those customers on a personal basis and maintain accurate records of the purchases and preferences of those customers for that purpose. For example, a direct marketing firm might use its computer records to remind its busy customers of birthdays for which they have sent presents in previous years. Such purchase information is useful to direct marketing firms as a means of serving their customers, avoiding being out of stock on popular items, and identifying buying trends to meet the needs of large numbers of customers.

4.2 DESCRIPTION OF THE MARKET

4.2.1 Demand for direct marketing

Like advertising, the demand for direct marketing originates from consumer demand for accurate information on goods and services.

In addition, direct marketing also has a number of advantages for consumers. In particular, it potentially reduces:

- the prices of goods and services;
- the search costs they incur trying to find suitable goods and services, since direct marketing tends to provide consumers with information that is more likely to be of interest to them; and
- the transaction costs associated with purchasing those goods and services, since they can purchase those goods and services from their own homes either over the phone, or via the Internet, using their credit cards.

However, direct marketing also has a number of disadvantages from the consumer's perspective. In particular:

- it may be difficult for the consumer to determine the actual quality of the goods until they have been supplied;
- the consumer may not know from whom they are actually purchasing the goods and services, making it difficult to lodge a complaint and obtain an exchange of goods or a refund when those goods are defective;
- it may be difficult for the consumer to determine the full conditions of purchase and payment arrangements they are accepting.

4.2.2 Supply of direct marketing

Direct marketing is becoming an increasingly important component of the marketing strategies of both Australian and overseas firms:

- In 1998, advertising media expenditure on direct marketing in Australia exceeded \$9 billion and is currently growing at an annual rate of 15 per cent. Nationwide, 550,000 are employed in direct marketing related activity.

- In the 12 month period from August 1997 to 1998, 3,275 consumer oriented direct mail campaigns were recorded and in 1999 direct mail amounted to more than 500 million articles.
- Advertising spending on catalogues was valued at \$1.3 billion in 1998.
- Telemarketing is currently growing at a rate of 25 per cent a year and employs 50,000 people nationwide.
- Call-centre products and services generate over \$15 billion in revenue and are expected to grow to \$20 billion this year.
- Loyalty programs have been responsible for a two-thirds increase in the value of credit card transactions since 1995.
- The number of on-line purchases grew 183 per cent to 803,000 in 1999.

Direct marketing enables firms to avoid the significant costs associated with setting up and operating a permanent retail establishment. In addition, direct marketing also has a number of distinct advantages for firms over advertising. In particular, it allows firms to:

- reduce the cost of marketing products to certain categories of consumers by avoiding the costs of having to supply advertising to those consumers who do not ultimately purchase their products;
- tailor the particular mode of communication to suit a particular type product and customer;
- personalise their communications with potential customers;
- segment the market for their products, adopt different marketing strategies in each of those segments, and even charge different prices;
- obtain more immediate and detailed feedback from potential consumers.

Despite these advantages, direct marketing also has a number of disadvantages for firms including:

- Intrusiveness. Where direct marketing techniques are used in an unprofessional manner they are likely to produce a negative response from consumers. For example, the use of telemarketing to “cold call”, especially where the offer is irrelevant to the person called, is particularly unwelcome. While not strictly speaking direct marketing, the wholesale distribution of unsolicited advertising material (junk mail) in order to build retail sales, has also elicited a negative consumer response. Such abuse is perceived by consumers as

compromising their privacy. Since direct marketing firms operate at a distance from their customers, it is also perceived that there is greater scope for fraud.

- The costs of acquiring accurate data on consumer preferences. The effectiveness of direct marketing rests heavily on the availability of accurate information on consumer preferences.
- The problems associated with determining the identity of the purchaser. This increases the risk that the transaction will fail unless some form of financial security is provided prior to delivery (eg a credit card number).

4.2.3 Nature of market failure(s)

Like the advertising market, the market for direct marketing can fail to operate efficiently and equitably due to:

- asymmetric information between firms and consumers concerning the prices, performance, and availability of goods and services;
- external costs arising from direct marketing activities (eg the costs arising from the provision of incomplete or misleading information, and the use of coercive marketing techniques;
- the public good nature of information provided by some forms of direct marketing; and
- the adverse effect that the abuse of direct marketing techniques can have on certain social objectives (eg protecting individual rights to personal privacy and data privacy).

Direct marketing has similar effects to advertising on the extent of the information asymmetries that exist between firms and consumers regarding product prices, performance and availability. That is, direct marketing has the potential both to reduce and increase that asymmetry.

For example, direct marketing can reduce this asymmetry by providing consumers with access to accurate information on the prices, performance and availability of a wider range of goods and services. It can also provide efficient after sales support and promote mutually beneficial long term consumer relationships.

By contrast, direct marketing also can increase that information asymmetry by providing incomplete or misleading information. In addition, direct marketing can:

- obscure the identity of the firm supplying the goods and services, providing greater scope for firms to supply lower quality merchandise with little after sales service; and

- provide firms with marketing techniques that are much more effective in influencing consumer preferences than ‘awareness’ advertising. Of particular concern is the ability of disreputable firms to use direct marketing techniques to coerce consumers into purchasing their products.

Direct marketing offers firms a much more targeted means of promoting their products than advertising. As a result, in theory, it should reduce the some of the external costs that the community would have to have borne if the firm had used advertising to promote their product.

In practice, however, these potential benefits will be offset to some extent by the additional external costs arising from direct marketing.

For example, direct marketing techniques pose a much greater threat to personal privacy and data privacy than does advertising since direct marketing techniques can be much more intrusive than advertising. While it is easy to ignore radio and television advertising, it is much more difficult to ignore telemarketing, direct mail or email. In addition, some consumers are much more vulnerable to direct marketing techniques than others and can be coerced into purchasing goods and services they would otherwise not have purchased. For example, poorly educated individuals, migrants and the aged can be targeted by unscrupulous firms using high pressure direct selling techniques.

4.3 THE PRESENT SYSTEM OF SELF-REGULATION

4.3.1 Background

The Australian Direct Marketing Association (ADMA) has administered a self-regulatory Code containing fair trading guidelines for over 20 years and in 1980s, telemarketing guidelines were introduced to the Code.

In 1996, under the auspices of the Ministerial Council on Consumer Affairs, ADMA worked closely with the government, consumer and industry groups on the development of a Model Code of Practice for Direct Marketing. This Model Code was promulgated in 1997 and was adopted by ADMA in 1998.

The conclusion of this process coincided with the release, in February 1998, of the Federal Privacy Commissioner’s National Privacy Principles (NPPs). ADMA immediately announced its intention to make the NPPs an integral part of its new Code of Practice. Thus,

ADMA became the first national industry association to adopt the NPPs in their entirety in its Code of Practice.

Subsequently, ADMA sought and obtained the authorisation of the Australian Consumer and Competition Commission under section 88(1) of the Trade Practices Act to enable its independent Code Administration Authority to apply punitive sanctions against any member found to be in breach of the Code, including its privacy provisions. This measure significantly strengthened the Association's powers to enforce its Code.

4.3.2 Objectives of the Code

The objectives of the Code are to:

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

The Code is considered by the industry to be essential to its expansion. Although the direct marketing industry in Australia is currently growing at a rate of 15 per cent per annum, ADMA considers that future expansion is very much dependent on consumer confidence in how direct marketing is conducted.¹ Since they operate at a distance, rather than face to face with their customers, direct marketers place greater emphasis on building consumer confidence and trust. The Code is viewed as a means of enhancing the reputation of the industry to facilitate continued growth in consumer demand.

4.3.3 Development of the Code

In 1994, Consumer Affairs Ministers were sufficiently concerned about the trade in mailing lists and about telemarketing practices to instigate an inquiry into direct marketing practices. At much the same time ADMA, concerned about unscrupulous direct marketing practitioners who brought the practice into disrepute, had also been urging ministers to consider mechanisms to provide greater coverage of codes on direct marketing practices. One of ADMA's concerns was the difficulty in obtaining support, outside of its membership, across

¹ Speaking notes for Rob Edwards. ADMA Code of Practice launch, Monday, 9 November 1998

the industry for its existing Standards of Practice. The Standards of Practice were broad ranging but they did not provide for enforcement powers and as a result did not discourage unscrupulous behaviour.

In 1995 the Ministerial Council on Consumer Affairs (MCCA), which is made up of Commonwealth, State and Territory consumer affairs Ministers, fostered the development of a code of practice for the direct marketing industry. The code was intended to address a number of consumer concerns that related to direct marketing. The areas of most importance were identified by the MCCA as relating to:

- information disclosure, where direct marketers provide information about their geographic location and returns policies.
- cooling off periods, where consumers can inspect a product before committing themselves to its purchase.
- the use and disclosure of personal information (that is, privacy).
- telemarketing, where consumers are contacted at home at inconvenient times, or where telemarketers have access to lists of silent numbers.

In 1997, the MCCA released the Direct Marketing — Model Code of Practice to provide guidance to industry on how to address consumer concerns about direct marketing. The Model Code was drafted by a Working Group chaired by the Australian Competition and Consumer Commission (ACCC) and including representatives of industry, the Australian Consumer's Association, the Consumer's Federation of Australia, Commonwealth, State and Territory consumer affairs agencies, the Commonwealth Attorney-General's Department and the Office of the Privacy Commissioner. The final product was the result of three years work.

ADMA, following advice from the MCCA, chose to implement all of the provisions contained in the Model Code as a way of enhancing consumer confidence in direct marketing. ADMA then embarked on an extensive consultation campaign with members to gain acceptance of the provisions of the Model Code.

The ADMA Code was launched in draft form by the ACCC on 9 November 1998 in conjunction with the ACCC's Global Commerce Conference in Sydney. This attracted criticism from various consumer groups, especially since the Code was launched before the ACCC had completed its authorisation process and before it had held its pre-decision hearing (scheduled for 26 November 1998). The hearing would have provided an opportunity for interested parties to put their views about the benefits and weaknesses of authorisation. ADMA has disputed the claim that insufficient consultation had taken place, stating that

consultation before the launch of the Model Code, on which the ADMA Code is based, was extensive.

Since the Code's inception, an industry education initiative has been undertaken by ADMA, to assist members in ensuring that their organisation complies with the Code. This has taken the form of Code compliance workshops, held across Australia, in which more than 350 members have attended.

4.3.4 Code Coverage

Scope of the Code

For the purposes of the ADMA code, the term 'direct marketing' means the marketing of goods and services, or the seeking of donations through a means of communication at a distance where:

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

Membership of ADMA

In 1998-99, ADMA accounted for over 400 organisations involved in information-based marketing including financial institutions, publishers, catalogue and mail-order traders, Internet-based marketers and service providers, direct response agencies and consultants, list and database specialists, printers, mail houses and fulfilment services, and other users and suppliers of direct marketing services. Together, these organisations are responsible for over 80 per cent of the \$9 billion annual direct marketing advertising spending in Australia.

Members include publishers, major financial institutions, charities, catalogue and mail-order traders, Internet traders and service providers, airlines and automobile manufacturers as well as industry suppliers such as printers, call centres, delivery services, advertising agencies and list and database specialists. Additionally, there are also those companies involved in business-to-business direct marketing.

It is important to note that the scope of the Code is not limited to ADMA members. It also applies to all employee, agents or subcontractors of ADMA members.

In addition, the parts of the Code dealing with telemarketing (Part C) and consumer data protection (Part E) are intended to apply not only to direct marketers, but also to fundraisers and charities trying to generate donations.

If ADMA becomes aware of an alleged breach of the Code by a direct marketer who is not a member, ADMA will bring that matter to the attention of the company concerned and seek compliance.

In order to reduce the scope for non-members to free ride on the benefits arising from the implementation of the Code:

- only ADMA members have the right to bear the “Direct Marketing Code Compliant” seal; and
- a public awareness program has been undertaken with the support of member publishers, cataloguers and mailers, to assist consumers to recognise Direct Marketing Code Compliant companies.

4.3.5 Overview of the Code

The Code sets out standards of conduct for participants in the direct marketing industry in relation to their customers and serves as a benchmark in settling disputes between industry participants and consumers.

Part B of the Code sets out standards of fair conduct for direct marketers. Those standards govern the information provided to consumers (eg the need to avoid false claims and provide consumers with sufficient information to make informed purchase decisions and be able to identify the direct marketer).

In addition, the standards outline the conduct of direct marketers. This contains provisions outlining the need to specify the terms and conditions of any prizes, ensure sufficient supplies are available, avoid unfair conduct such as exploiting customers with poor spoken or written English, and restrict sales to minors. In particular, it:

- provides a seven day "cooling off" period, during which a customer is entitled to cancel a direct marketing contract; and
- requires members to ensure the customer's right to cancel the contract is specified in any contractual documents.

In recognition of the potentially intrusive nature of direct marketing, the Code also includes:

- a Do Not Mail/Do Not Call service, whereby individuals can have their names removed from marketing lists used by hundreds of businesses for direct marketing purposes; and
- the internationally recognised consumer data protection measures, which are outlined in Part E of the Code.

As of March 2000, a total of 23,771 individuals had registered to gain Do Not Mail/Do Not Call status. Of these, 12,009 had registered not to receive direct mail and calls, whereas 11,463 had registered not to receive mail, and 299 had registered not to receive calls.

Part C of the Code sets out the fair conduct provisions relevant to telemarketing (eg the need to identify the caller, provide information on request, avoid marketing in the guise of research, and to comply with acceptable calling conduct, permitted calling times, line disconnection times, and calling frequency).

Part D of the Code sets out the fair conduct provisions relevant to electronic commerce (eg fair business, advertising and marketing practices, online disclosures; confirmation, payment, dispute resolution and privacy). In a conscious effort to maintain internationally operative standards of practice in Internet marketing, ADMA has adopted draft OECD guidelines for e-commerce in its new Code of Practice. These international guidelines cover issues such as the provision of clear and unambiguous information about the identity of the businesses and the goods or services they offer, verifiable contracts, effective consumer complaint handling and security/authentication measures.

Through its E-commerce Committee and Ethics & Privacy Committee, ADMA has developed an online privacy policy for use by members.² The ADMA Code of Practice affords e-commerce customers the same level of protection as is afforded customers in the off-line world. ADMA is also involved internationally in pushing a common standard of practice for the global direct marketing industry in the areas of cross-border complaints handling, mail, telephone, and e-mail preference services, and privacy principles.

Part E of the Code sets out the fair conduct provisions relevant to consumer data protection. These measures give consumers control over their personal information by limiting collection of customer information and requiring marketers to tell consumers who they are, how to get in touch with them and what they intend to do with personal information. Consumers must be given the opportunity to block transfer of their contact details to any other marketer.

² Privacy Policy: <http://www.adma.com.au/members/newsEcommerce4.htm>

Guidelines for shopping online: <http://www.dcita.gov.au/shoponline/>

The rules relating to the enforcement of the Code and the review and amendment of the Code, are outlined in Parts F and G respectively. These provisions are discussed further below.

4.3.6 Operation of the Code

Complaint handling procedures

Members are required to have their own internal customer complaints-handling procedures in place. This internal complaint handling is designed to be the first port of call for a complainant. If the complainant is unhappy with the response of the member organisation, they are then encouraged to appeal to the Code Authority for adjudication. Alternatively, should a complaint that does not appear to breach the Code be received by the Code Authority, the complaint will be referred to the member's own complaints handling body for consideration.

This provides an opportunity for the member to resolve complaints and also to screen out frivolous claims.

A key feature of ADMA's Code of Practice is the existence of an independent complaints handling body, led by a chairperson from outside the direct marketing industry. It investigates unresolved consumer complaints involving ADMA's member organisations and can apply a range of sanctions to an offending member. The Code Authority is made up of equal numbers of consumer and industry representatives. It is chaired by John Wood, a former Deputy Commonwealth Ombudsman, and includes Robert Tolmie (a former Chairman of the Board of Directors of the Association), Colm Lorigan of American express (former CEO of the Australian Federation of Consumer Organisations), and consumer representatives Robin Brown (former CEO of the Australian Federation of Consumer Organisations) and Bill Dee (who has spent over 20 years in the ACCC gaining wide experience in the area of compliance with self-regulation code of practice).

Once a complaint has been lodged with the Code Authority, the member company is allowed two weeks to respond to the complaint. If the Code Authority confirms the complainant's allegations then ADMA will issue a notice to the member with instructions to take remedial action with regard to the complaint and/or sanction the member for the breach.

As outlined in Part F of the Code, ADMA's enforcement procedures are limited to alleged breaches of the Code. Those enforcement procedures do not cover consumer complaints that

do not involve a breach of the Code. Such complaints are handled by the member's internal complaints handling process.

Consumer complaints involving an alleged breach of the Code that are not resolved under the member's internal complaints handling process, must be referred by the member to ADMA.

If the Code Compliance Officer does not consider there has been a breach of the Code, the officer must inform the complainant of the decision and their options. These include:

- requesting ADMA to review the decision should new information become available;
- requesting the Code Authority to review the decision of the Code compliance officer (In such a case the Code Authority can direct the officer to investigate the matter further, or invite the member to attend a hearing of the alleged breach of the Code); and
- pursuing other forms of redress, such as lodging a complaint with a government regulatory authority.

If the Code compliance officer considers there has been a breach of the Code by a non-member, the officer may write to that organisation, informing them of the existence of the Code and requesting compliance.

If the Code compliance officer considers that a member has breached the Code, the officer is required to write to the member outlining the particulars of the alleged misconduct and requesting a written response to the allegations within 14 days. If the member provides clear evidence within that period that they have been acting in accordance with the Code, or independently resolves the complaint, then the Code Officer must advise the complainant of:

- the reasons why no further action is to be taken; and
- their ability to request the Code Authority to review the decision.

As indicated in Table 4, a total of 29 complaints were received by ADMA in the 1999 calendar year, of which 17 (61 per cent) related to the activities of members, whereas 11 (39 per cent) related to the activities of non-members.

Table 4: ADMA complaints received, 1999 calendar year

	<i>Member</i>	<i>Non-Member</i>		<i>Total</i>
January	2	0		2
February	1	0		1
March	1	1		2
April	0	1		1
May	1	0		1
June	2	0		2
July	1	2		3
August	0	6		6
September	0	1		1
October	1	0		1
November	4	0		4
December	4	0		4
TOTAL	17	11	28 (+ 1 unknown)	
Percentage of total	61	39		100

Dispute resolution procedures

If the member disputes the complaint, they are required to provide evidence of the steps they have undertaken in the matter to ensure compliance with the Code. If they are unable to do this within a reasonable period of time, the Code Compliance Officer is required to refer the complaint to the Code Authority for its consideration.

When reviewing a complaint, the Code Authority can request the officer to investigate the complaint further, invite the member to attend a hearing regarding the alleged breach of the Code, or decide not to pursue the alleged breach further.

Prior to a hearing, the member is able to make written and verbal submissions to the Code Authority and to inspect any documents to be considered by the Code Authority. At the hearing, members are also given reasonable opportunity to present their case either by appearing in person, or seeking legal representation.

The CEO of the Code Authority is required to provide the member with a notice outlining the Authority's decision within 14 days of the conclusion of the hearing. If the Authority decides there has been a breach of the Code, that notice must also outline the remedial action and/or sanctions considered appropriate by the Code Authority. The Authority is also required to advise the complainant in writing of the decision, and the reasons underlying that decision.

Penalties for non-compliance with the code

If the member fails to comply within 14 days of the receipt of the decision, the CEO of ADMA is required to call a special meeting of the Board of Directors to consider removing the member from the Association, subject to the recommendation of the Code Authority.

The Code Authority is able to impose a range on sanctions on members that breach the Code, including:

- formal apologies;
- corrective advertising, or the withdrawal of offending advertisements or statements;
- correction or deletion of relevant records and personal information;
- refund or replacement of goods and services;
- specific remedial action to correct the breach and avoid re-occurrence;
- written undertakings that the breach will not be repeated;
- recommendations to the CEO of ADMA to revoke membership.

In addition, the Board of ADMA, but not the Code Authority, is able to:

- order the payment of money, transfer of property or the delivery of goods;
- suspend or cancel the membership of a member; or
- issue a public admonition of the member.

If a member breaches the Code on two or more occasions in a twelve month period, the Code Authority may recommend to the CEO of ADMA that membership be revoked.

To ensure that the ADMA Code included suitable enforcement mechanisms an application was submitted to the ACCC for approval under Section 88.1 of the Trade Practices Act. The ACCC authorisation process enables organisations to obtain protection from legal action for conduct that would otherwise be at risk of contravening the competition provisions of the *Trade Practices Act 1974*. Anti-competitive conduct can only be authorised on public benefit grounds. Essentially, the process provides for the ACCC to decide that the public benefit outweighs the detriment caused by any possible anti-competitive elements of the Code. Authorisation was granted on 16 August 1999.

The Code requires ADMA to publish in its Annual Report details of:

- the number of complaints received by the Code compliance officer during the year;

- the number of breaches established by the Code compliance officer and the Code Authority during the year;
- an analysis of the enforcement action taken during that year;
- a statistical analysis of complaints by company.

4.3.7 Administration of the Code

Organisation responsible for administration of the Code

ADMA is responsible for the administration of the Code.

Procedures for monitoring, reviewing and amending the Code

Part G specifies that the Code shall be subject to an independent review on a regular basis by a review body comprising an independent chair and an equal number of industry and consumer/community representatives. In conducting the review, the review body is required to consult, where appropriate, with groups affected by the Code. The Code also authorises the Board to amend the Code. Once an amendment has been made, the Board is required to notify members and publicise those amendments.

To date no formal review has been conducted, however, the ACCC has conducted its own extensive review of the Code as part of its Authorisation process. Authorisation has since been granted which gives ADMA the freedom to impose sanctions on its members.

Funding

ADMA is an industry-funded body. Membership of ADMA costs direct marketers a fixed annual fee, which is determined by the member's annual direct marketing revenue. Those companies that earn less than \$750,000 in annual direct marketing revenue will need to pay an annual membership fee of \$950 while those companies earning over \$10 million will need to pay \$15,000³.

ADMA does not levy any fees or charges on complainants with respect to the enforcement procedures, however all complainants must bear their own costs in making the complaint.

³ A scale of annual membership fees is available on ADMA's membership application form which is located at <http://www.adma.com.au/library/Membership.pdf>

4.3.8 Other Regulations Affecting the Industry

Given that direct marketers are themselves a diverse range of companies with a diverse range of business interests it is the case that many companies associated with the ADMA Code are also bound by other industry association codes. In this case it is generally up to the industries (except under co-regulatory schemes that make it a statutory requirement for a company to resolve a claim) to determine which body is best suited to handle a claim.

In addition, ADMA members are required to abide by any statutory requirements under the Trade Practices Act 1975, the Privacy Act 1988 and relevant State and Territory legislation. Of particular note are the Victorian Government's recent changes to its fair trading laws. The changes were intended to ensure companies that are not members of ADMA are held to the same standards as members, however, ADMA claims that these laws have the potential to be inconsistent with the ADMA Code. ADMA has vowed to stay in close contact with the Victorian Department of Fair Trading to ensure that any fair trading related issues involving ADMA members are first dealt with through the association's complaints handling procedures.

4.4 FEATURES OF THE MARKET THAT MAKE SELF-REGULATION MORE OR LESS EFFECTIVE

4.4.1 Overall effectiveness in addressing market failure(s)

As is the case with advertising, the nature and extent of the market failure not only provides an incentive for firms to engage in self-regulation of direct marketing, but it also influences their ability to develop and operate effective systems of self-regulation.

In particular, the range and complexity of the market failures makes it much more difficult for firms to develop and operate effective systems of self-regulation to reduce instances of that market failure. For example, as discussed in section 4.2.3, the external costs arising from direct marketing range from simple instances of providing incomplete, inaccurate or misleading information on product prices, through to instances of invasion of personal privacy and data privacy.

It may be relatively easy to detect and prove that firms engaged in direct marketing have misled consumers over the price of a particular product, or have failed to provide them with sufficient information about the terms and conditions of their contract so they can determine its full price. However, it is much more difficult to detect and prove other potential sources of market failure such as coercion, particularly given:

- the diverse views of consumers as to what types of direct marketing activities are socially unacceptable; and
- the absence of clear legislative guidance as to consumer rights in the area of data privacy.

In addition, firms may have little information on the magnitude of the costs that their direct marketing activities are imposing on consumers.

These problems tend to reduce the effectiveness of self-regulation, particularly a single code of practice. No single code can be expected to be able to deal with a wide range of different forms of market failure, just as no single piece of government legislation could be expected to deal with those problems effectively.

The design of the present ADMA code reflects the existence of these practical constraints and takes a different approach to the present advertising code. Rather than rely on a single code to deal with a range of market failures, the present ADMA code in effect contains a number of sub-codes that are designed to deal with the particular types of market failures that arise from the use of certain media.

4.4.2 Product related factors influencing effectiveness

The nature of the product that is being marketed, and the type of direct marketing used, also influence both the incentive and ability of firms to develop effective systems of self-regulating direct marketing.

Direct marketing is used to market an extremely wide range of products, with vastly different economic lives (both consumables and consumer durables) and relative importance to consumers (both products that are essential to the welfare of consumers, and products that are ‘discretionary’). In addition, direct marketing involves a wide range of techniques that can impose vastly different external costs on consumers and the wider community.

In general, the incentive to self-regulate direct marketing will be greatest in those cases where the particular technique of direct marketing results in:

- significant economic inefficiencies, by distorting consumer choice between relatively high value products that are consumed by most individuals in the community, and are closely substitutable in consumption or production; or
- significant inequities, by compromising social values that are strongly held by most individuals in the community.

In particular, the incentive to self-regulate will be greater where the direct marketing firm:

- does not have high brand recognition and therefore relies on the consumer confidence engendered by ADMA affiliation;
- seeks to differentiate itself from other firms in the industry on the basis of its commitment to quality products, consumer satisfaction, and good business practices;
- is a supplier of products to other organisations employing direct marketing techniques and wants, or needs to, establish its reputation with those organisations.

However, the incentive for firms to self-regulate direct marketing will be reduced to some extent:

- if the firms producing highly substitutable products do not themselves use direct marketing techniques; or
- if the firm already enjoys high brand recognition and consumer trust.

The types of direct marketing techniques used, and the types of products marketed, also influence the extent to which firms are able to develop and operate an effective system of self-regulation. For example, certain types of direct marketing techniques such as Internet marketing are easier to monitor than other techniques such as telemarketing “cold calling”.

4.4.3 Impact of nature and extent of competition between firms on effectiveness

As discussed in section 4.2.3, direct marketing is a highly competitive industry comprising large numbers of resident and non-resident firms using a wide range of direct marketing techniques to market a wide range of heterogeneous goods and services.

Of particular relevance to the self-regulation of direct marketing is:

- the rapid emergence of new telecommunication technologies; and
- the globalisation of world markets.

These developments have a number of important implications for the nature and extent of competition between firms in Australian product markets and the effectiveness of the direct marketing code.

In some respects, rapid advances in technology can reduce the need for self-regulation to some extent by improving the efficiency with which markets operate. For example, the rapid growth of direct marketing via the Internet has the capacity to increase competition between firms by:

- enabling consumers to purchase brand name products they trust through direct marketing channels as opposed to normal retail outlets;
- providing consumers with unprecedented access to information on product prices, performance and availability; and
- increasing the range of goods and services available to consumers.

However, rapid advances in technology also increase:

- the number of new, improved and complex products; and
- the number of suppliers, particularly overseas suppliers whose reputations are not well known to consumers.

This increases the scope for disreputable firms to engage in direct marketing practices and the need for some form of regulation such as self-regulation.

In addition, the combined impact of technological change and the globalisation of world markets has opposing influences on the effectiveness of self-regulation.

For example, advances in direct marketing technologies providing firms with access to much better information on consumer preferences, and an ability to stop the circulation of information to those consumers who are not interested in the products being marketed.

In addition, the globalisation of world markets is reducing the effectiveness of domestic legislation as a means of regulating the activities of firms producing tradeable goods and services, since it is difficult to force non-resident suppliers to comply with that legislation.

However, the globalisation of world markets is also reducing the effectiveness of the self-regulation of direct marketing to some extent since direct marketing standards tend to vary across jurisdictions. It also makes the development of standards more complex since it must involve consultation with regulatory authorities in other jurisdictions. This highlights the importance of ADMA's efforts to co-ordinate the development of Australian direct marketing standards for electronic commerce with international trends.

4.4.4 Commonality of producer and consumer interests and effectiveness

The effectiveness of the direct marketing code also depends on the extent to which firms engaged in direct marketing and consumers share a common interest in reducing the external costs arising from direct marketing activities. As outlined below, this depends on similarity of consumer and firm interests in reducing those costs, and the extent to which those interests overlap.

Similarity of consumer interests

Self-regulation of direct marketing tends to be more effective in those cases where consumers share similar interests with each other in reducing the costs arising from direct marketing. This is more likely to be the case in those instances where direct marketing imposes monetary costs on consumers. For example, consumers tend to share relatively similar views about the ethics of direct marketing that provides misleading price information.

By contrast, self-regulation of direct marketing tends to be less effective in those instances where consumers have divergent views about the merits of reducing those external costs. This is more likely to be the case in relation to where the costs imposed on individuals are more non-pecuniary in nature. For example, consumers have divergent views on privacy issues.

This divergence of consumer interests tends to reduce the effectiveness of self-regulation by making it more difficult for firms to:

- develop, monitor, and enforce a code of self-regulation that suits the interests of all consumers; and
- determine the extent to which the consumers and other individuals in the community are adversely affected by direct marketing.

These problems are reduced to some extent by the existence of effective consumer organisations and the inclusion of consumer representatives in the Code Authority. The recently introduced Privacy Bill will also clarify consumer rights and ensure that the National Privacy Principles are legally enforceable.

Similarity of producer interests

The development and implementation of the present direct marketing code illustrates the strong common interest that firms using direct marketing techniques have in improving consumer acceptance of those techniques.

However, the wide variety of direct marketing techniques, and the wide range of heterogeneous products that are marketed using those techniques, also means that producer interests may diverge on the merits of regulating certain forms of direct marketing.

This divergence of producer interests in regulating direct marketing tends to reduce the overall effectiveness of self-regulation by making it more difficult for the Code Authority to:

- develop, monitor, and enforce objective standards that suit the interests of all producers; and

- determine the extent to which each firm’s activities adversely affect consumers, other firms, and the wider community.

The divergence of producer interests is reduced to some extent by the existence of an effective Code Authority that is able to reconcile those differences. It is also reduced to some extent by:

- the manner in which the direct marketing code has been designed;
- the existence of the “Direct Marketing Code Compliant” seal, which creates a common interest among member firms to preserve their joint reputation; and
- the existence of legislation that clarifies acceptable business practices (eg trade practices and ‘fair trading’ legislation, and environmental legislation).

Overlap between consumer and producer interests

Self-regulation of direct marketing tends to be more effective in those cases where there is a significant overlap between the interests of firms, consumers and the wider community. That is, it will be more effective in those cases where most firms engaged in direct marketing and consumers share a common interest in reducing the external costs arising from direct marketing.

This is more likely to occur where those external costs are the result of the activities of only a few firms engaged in direct marketing, and most of those costs fall predominantly on consumers of the product, and other firms engaged in direct marketing. For example, both direct marketing firms and consumers share a strong common interest in the operation of a do not mail/call service since this saves consumers the costs of having to deal with unwanted offers and saves firms the costs of wasted marketing activities.

By contrast, self-regulation will tend to be less effective in those cases where the interests of firms engaged in direct marketing diverge significantly from those of their consumers and the wider community. This is more likely to be the case where those external costs:

- are due to the activities of most firms in the market; and
- fall on sections of the community other than consumers of those products or other firms engaged in the direct marketing of substitutable products.