

Chapter 15

Direct marketing

- 15.1 This chapter is concerned with the regulation of direct marketing from the perspective of protecting privacy, and with whether current controls on direct marketing are adequate or whether additional controls are needed. It also looks at the issue of targeted internet advertising based on people's online behaviour.

BACKGROUND 15.2 Direct marketing is the making of marketing approaches to individuals by commercial marketers or businesses, whether New Zealand or overseas based,¹³²⁹ by various methods including mail, telephone calls, email (or spam), door-to-door approaches in person, automated dialling machines and, more recently, automated SMS messages. Direct marketing also includes requests for donations to charities, political parties and other groups. Approaches may be made using information obtained from marketing lists, public information (such as phone books or public registers) or information compiled based on previous transactions with the individual.

- 15.3 The Privacy Act defines direct marketing as:¹³³⁰
- (a) the offering of goods or services; or
 - (b) the advertising of the availability of goods or services; or
 - (c) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political, or other purposes,—
by means of—
 - (d) information or goods sent to any person by mail, facsimile transmission, electronic mail, or other similar means of communication, where the information or goods are addressed to a specific person or specific persons by name; or
 - (e) telephone calls made to specific persons by name.

¹³²⁹ The cost of offshore marketing to New Zealand consumers is falling due to internet communications technologies such as Skype. Voice calls are not electronic messages (spam) under the Unsolicited Electronic Messages Act 2007, sch, clause 1.

¹³³⁰ Privacy Act 1993, s 9(2). The definition has no current purpose in the Act and it was used to exempt the application of principle 11 to disclosures before 1 July 1996 of personal information collected before 1 July 1993 for direct marketing purposes. However, the definition is used in the Telecommunications Information Privacy Code (discussed below). See *Necessary and Desirable* para 2.17.

- 15.4 The Code of Practice for Direct Marketing in New Zealand defines “direct marketing” as the process by which consumers are offered the opportunity to obtain or purchase goods or services or make charitable donations direct by mail, newspaper, magazine, radio, television, telephone, facsimile, email, Internet or any similar means of communication.¹³³¹
- 15.5 Direct marketing may be either solicited or unsolicited. Solicited marketing is marketing to an individual that has been authorised, often in advance, as part of an existing relationship with a business or organisation (that is, the marketing of further products or services) or in response to enquiries.
- 15.6 Direct marketing is a useful tool for businesses in distributing information about their products and services and gaining new customers. It therefore has an important role in contributing to the economic performance of businesses and the economy as a whole. Marketing initiatives can benefit consumers by informing them of new products and pricing, including discounts, and this information flow can therefore improve economic efficiencies between buyers and sellers of products and services, as well as competition between businesses, to the benefit of the market.
- 15.7 While some individuals actively welcome marketing approaches, some forms of marketing are more intrusive than others and may have negative effects on the individuals to whom they are targeted. The question is whether the current rules achieve the right balance between business, economic and individual interests and whether the current regulatory tools need to be adjusted or supplemented to achieve a reasonable balance.

How direct marketing affects privacy

- 15.8 Unwanted direct marketing is often experienced as a nuisance. One initial question is whether it is a privacy intrusion. In an earlier report, we concluded that it was probably more accurate to describe receiving unwanted marketing material as an irritant than an invasion of privacy, at least in the context of using information from public registers for marketing purposes.¹³³² Some see it as an intrusion – in other words, an invasion of spatial privacy. Apart from this, however, New Zealanders have expressed concern about how their personal information is treated by businesses. In a 2008 survey commissioned by the Privacy Commissioner, 90 per cent of New Zealanders surveyed were concerned (including 74 per cent very concerned) if a business they did not know got hold of their personal information. The survey also found that 88 per cent were concerned (including 72 per cent very concerned) if a business asked them for personal information that does not seem relevant to the purpose of the

¹³³¹ Marketing Association “Code of Practice for Direct Marketing in New Zealand” reviewed October 2009 www.marketing.org.nz (accessed 15 December 2009).

¹³³² New Zealand Law Commission *Public Registers: Review of the Law of Privacy Stage 2* (NZLC R101, Wellington, 2008) para 4.65.

transaction, while 86 per cent were concerned (including 73 per cent very concerned) if a business they supplied their personal information to for a specific purpose used it for another purpose.¹³³³

- 15.9 According to Daniel Solove's "Taxonomy of Privacy", things like spam, junk faxes and telemarketing are examples of intrusions into people's private affairs.¹³³⁴ The South African Law Commission, in considering the nature of direct marketing, found it to be an accepted fact that there is a privacy dimension in the collecting and using of information for purposes not agreed to by the data subject and certain harmful aspects of personal information handling (such as misleading conduct in the collection and use of personal information).¹³³⁵
- 15.10 The Australian Law Reform Commission (ALRC) conducted a phone-in in 2006 and found that 3 out of 4 callers nominated unsolicited telemarketing as their number one privacy complaint: "People face a barrage of information, emails and messages all day. They want their home to be a sanctuary and see telemarketing calls as an unwanted intrusion into their private life."¹³³⁶ The ALRC has also noted that the issue of direct marketing and its regulation provokes strong responses:¹³³⁷

On the one hand, there is a strong push from consumers and consumer advocates to tighten the rules on direct marketing to make it more difficult for companies engaged in direct marketing to communicate with people in this way, particularly with respect to unsolicited direct marketing. This draws on the conceptualisation of privacy as including, at least, "the right to be let alone." On the other hand, business groups and others have emphasised the importance of direct marketing for the economy generally. They have also stressed that, if direct marketing is carried out appropriately, it can be of considerable assistance to consumers that receive direct marketing communications. It is possible to balance these competing positions by recognising that some forms of direct marketing can be pernicious and can erode individuals' privacy rights but that, if undertaken appropriately, direct marketing also can be beneficial.

- 15.11 Another dimension is the growing trend towards the use of targeted or behavioural internet advertising as a form of marketing to internet users. Behavioural internet advertising is discussed further below. On the one hand, behavioural advertising seeks to reduce the annoyance factor to consumers by sending relevant advertising messages to the consumer. However, targeting is achieved through compiling profiles of information about consumers' online activities and preferences. In the 2008 survey commissioned by the Privacy Commissioner, two thirds of New Zealanders surveyed were uncomfortable or very uncomfortable about internet search engines and social networking sites tracking internet use and emails in order to deliver targeted advertising.¹³³⁸

1333 Office of the Privacy Commissioner *Individual Privacy and Personal Information Survey 2008* www.privacy.org.nz (accessed 13 January 2010).

1334 Daniel J Solove "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477, 522.

1335 South African Law Reform Commission *Project 124: Privacy and Data Protection: Report* (Pretoria, 2009) 343.

1336 Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) 891.

1337 Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) paras 26.27–26.29.

1338 Office of the Privacy Commissioner *Individual Privacy and Personal Information Survey 2008* www.privacy.org.nz (accessed 13 January 2010).

- 15.12 Direct marketing can be regarded as impacting on informational privacy where it involves the use of someone's personal details for an unwanted purpose. The next question to consider is therefore the extent to which direct marketing is regulated by the Privacy Act. The Privacy Act does not provide any specific controls on direct marketing, but applies the generic concepts that the use of personal information should be authorised by the person concerned and there should be transparency around the use of people's personal information. Whether direct marketing is regulated by the Privacy Act depends partly on whether marketing approaches are based on the use of "personal information" as defined in the Privacy Act. For example a telephone number, physical address, or an email address is not necessarily "personal information" unless it is linked to other information such as a person's name through which an individual becomes identifiable.
- 15.13 Even where information used for marketing approaches is "personal information", it may be able to be freely used or disclosed for marketing purposes by virtue of exceptions to the privacy principles such as consent (including a generic consent at the time that personal information is collected from an individual),¹³³⁹ or where the personal information is publicly available, for example from the phone book or a public register,¹³⁴⁰ or where use or disclosure of the personal information for marketing purposes is a purpose for which it was collected (or a directly related purpose).
- 15.14 Nevertheless, privacy principle 10 as it applies to telecommunication agencies¹³⁴¹ has been adapted by rule 10 of the Telecommunications Information Privacy Code 2003 to provide specific controls on direct marketing in that:¹³⁴²
- A telecommunications agency may use telecommunications information for another purpose if authorised by the individual concerned, but if the other purpose is for direct marketing, this is only permitted if the individual has been advised that he or she may withdraw such authorisation at any time.¹³⁴³
 - A telecommunications agency must not, without consent, use traffic data (such as dialling information) obtained as a result of interconnection, wholesaling or similar arrangements between network operators for the purposes of direct marketing to an individual who is not a subscriber of the agency.¹³⁴⁴ This was directed towards a practice where a customer of one company placing a call to a customer of another company would receive marketing from that company inviting them to switch networks.

1339 See New Zealand Marketing Association *Guide to the Privacy Act 1993* www.marketing.org.nz/cms/Resources/105 (accessed 3 December 2009): "Direct marketers can buy, rent or exchange personal information, but it must be with the authority of the individual."

1340 See New Zealand Law Commission *Public Registers: Review of the Law of Privacy Stage 2* (NZLC R101, Wellington, 2008) paras 4.54–4.59.

1341 These include including network operators, telecommunication service providers, directory publishers, directory enquiry agencies, internet service providers, call centres and mobile phone retailers: Telecommunications Information Privacy Code 2003, rule 4(2).

1342 See Office of the Privacy Commissioner *Privacy on the Line – Privacy in Telecommunications* (Wellington, 2000) 11–13.

1343 Telecommunications Information Privacy Code 2003, rule 10(1)(b).

1344 Telecommunications Information Privacy Code 2003, rule 10(2).

- 15.15 Where the use of personal information for marketing purposes is in breach of the privacy principles, one issue is the suitability and efficiency of the Privacy Act enforcement framework to respond to an issue involving mass use of personal information. The Privacy Act enforcement framework is based on individual complaints that require investigation to determine whether the marketing complained of was authorised by the individual or subject to any other exception to the principles. Authorisation may be difficult to trace due to changes of business policies, the repackaging of information into marketing lists and the sharing of marketing lists between companies. Investigations are therefore not straightforward and may not prove to be cost-effective in relation to the level of individual harm suffered. It is difficult for the Privacy Commissioner to deal with marketing complaints holistically where the issue raised may involve a mix of Privacy Act and non-Privacy Act issues (depending on whether the information used is personal information or not). The Privacy Commissioner's limited resources also mean that marketing complaints cannot always receive priority.
- 15.16 One question for consideration therefore is whether direct marketing requires a parallel enforcement measure that is more comprehensive, practical, cost-effective and consumer-friendly. If, as proposed in chapter 8, the Privacy Commissioner is given the power to issue enforcement notices, that will constitute one method of enforcement. In this chapter we outline other possible enforcement measures that have been introduced in other countries, such as express controls on direct marketing in data protection legislation that give consumers an express right to opt out of receiving direct marketing on a case-by-case basis, and, in relation to telemarketing, Do Not Call registers established by statute establishing a comprehensive opt-out right. These measures shift the focus from the resource-intensive investigation of privacy complaints to providing a practical consumer-controlled remedy. Investigation of breaches can then centre on whether there has been compliance with expressed opt-out preferences.

OTHER CONTROLS ON DIRECT MARKETING

- 15.17 The Unsolicited Electronic Messages Act 2007 controls the sending of unsolicited email, text messages and instant messaging, requiring an opt-in by the recipient before a organisation can send commercial electronic messages, and providing an opt-out for other promotional messages. The Act does not cover spam sent by fax, or voicemails. Internet service providers are required to deal with complaints about spam, with the Department of Internal Affairs having powers to investigate and enforce the Act.
- 15.18 The Harassment Act 1997 provides that one type of harassment is making contact with a person (whether by telephone, correspondence, or in any other way).¹³⁴⁵ A further act of harassment is giving offensive material to a person, or leaving it where it will be found, given to, or brought to the attention of, that person.¹³⁴⁶ To qualify as harassment, there must be at least two separate specified acts within a 12 month period.¹³⁴⁷
- 15.19 The Telecommunications Act 2001 contains an offence for the use of a telephone to disturb, annoy or irritate someone, whether by calling up without speech or by wantonly or maliciously transmitting communications or sounds, with the

¹³⁴⁵ Harassment Act 1997, s 4(1)(d).

¹³⁴⁶ Harassment Act 1997, s 4(1)(e).

¹³⁴⁷ Harassment Act 1997, ss 3 and 4.

intention of offending the recipient.¹³⁴⁸ However it is unlikely that direct marketing calls would trigger this offence, even in the case of repeated contact after the individual has expressed a request not to be further contacted. Only in unusual circumstances would direct marketing calls be “wanton” or “malicious”, or be made with the intention to offend.

- 15.20 The Marketing Association of New Zealand (in conjunction with the Advertising Standards Authority) has issued a Code of Practice for Direct Marketing in New Zealand, in consultation with the Ministry of Consumer Affairs, the Ministry of Economic Development, the Commerce Commission and the Consumers’ Institute.¹³⁴⁹ Principle 4 of the Code provides that marketers are to carry out their business in a way that is socially responsible. The Marketing Association maintains Do Not Mail (DNM) and Do Not Call (DNC) registers containing details of consumers who have requested no unasked for mail and/or telephone calls. The Code requires member marketers to check the list of people they plan to communicate with against the DNM and DNC registers and remove names from the prospecting lists if they appear on these registers, unless the person is an existing customer or has opted to receive marketing communications.¹³⁵⁰ In addition, calls may not be made to unlisted or unpublished numbers without the consumer’s permission.¹³⁵¹ The Code requires member marketers to provide individuals with an opportunity to opt out of receiving marketing information they have not requested and to have systems in place to effect opt-outs.¹³⁵² Two shortcomings of the voluntary scheme noted by the Privacy Commissioner are that it is confined only to members of the association and that it lacks enforcement mechanisms.¹³⁵³
- 15.21 The Marketing Association has also issued a Code of Practice for Telemarketing that requires telemarketers to remove a person’s name from the telephoning list and lists offered to other organisations if requested to do so, and to inform the person about the DNC register.¹³⁵⁴ Otherwise there is no obligation on marketers to inform individuals about the DNC scheme. This Code also provides that automatic dialling systems are not to be used to call residential lines.¹³⁵⁵

1348 Telecommunications Act 2001, s 112.

1349 Marketing Association “Code of Practice for Direct Marketing in New Zealand” www.marketing.org.nz (accessed 15 December 2009).

1350 Marketing Association “Code of Practice for Direct Marketing in New Zealand” www.marketing.org.nz (accessed 15 December 2009), principle 4(b).1.

1351 Marketing Association “Code of Practice for Direct Marketing in New Zealand” www.marketing.org.nz (accessed 15 December 2009), principle 5(c).3.

1352 Marketing Association “Code of Practice for Direct Marketing in New Zealand” www.marketing.org.nz (accessed 15 December 2009), principle 4(b).3.

1353 *Necessary and Desirable* para 2.9.13.

1354 Marketing Association “Telemarketing Code of Practice” www.marketing.org.nz (accessed 15 December 2009).

1355 Marketing Association “Telemarketing Code of Practice” www.marketing.org.nz (accessed 15 December 2009), principle 4(m)(a).

- 15.22 Other guidance issued by the Marketing Association includes:
- Best Practice Guidelines for Fax Marketing;¹³⁵⁶
 - 6 Guiding Principles for Responsible Email Marketers;¹³⁵⁷
 - Best Practice Guidelines for Mobile Marketing;¹³⁵⁸
 - Standards for Search Engine Marketing;¹³⁵⁹
 - Best Practice Guidelines Direct Marketing Data;¹³⁶⁰ and
 - Privacy Guidelines for Data Co-operatives.¹³⁶¹
- 15.23 An initiative of the Data Advisory Network (a special interest group of the Marketing Association) is the List Warranty Register which provides assurance to the marketing community that marketing lists provided by organisations participating in the scheme¹³⁶² are compliant with the Privacy Act and the Marketing Association's best practice guidelines.¹³⁶³

MARKET RESEARCH

- 15.24 Market research is “the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making.”¹³⁶⁴ Market research is an activity that shares some features of direct marketing. Like direct marketing, unsolicited contact from market researchers can be considered as a nuisance or irritant. However, some people are willing to provide personal information more freely for research purposes than for direct marketers.
- 15.25 The Privacy Act applies to the collection of personal information for the purposes of market research. In addition, the Market Research New Zealand Code of Practice applies to members of Market Research New Zealand and contains privacy provisions relating to privacy policies, collection of data, use of data, security of processing, rights of the respondent, and trans-border transactions. In particular, researchers are not to disclose personal identities of respondents to their clients or to disclose personal information to their clients unless the respondent has expressly consented and provided that this will not result in direct marketing and other commercial activities. More generally, researchers

1356 Marketing Association “Best Practice Guidelines for Fax Marketing” www.marketing.org.nz (accessed 15 December 2009).

1357 Marketing Association “6 Guiding Principles for Responsible Email Marketers” www.marketing.org.nz (accessed 15 December 2009).

1358 Marketing Association “Best Practice Guidelines for Mobile Marketing” www.marketing.org.nz (accessed 15 December 2009).

1359 Marketing Association “Standards for Search Engine Marketing” www.marketing.org.nz (accessed 15 December 2009).

1360 Marketing Association “Best Practice Guidelines Direct Marketing Data” www.marketing.org.nz (accessed 15 December 2009).

1361 Marketing Association “New Zealand Privacy Guidelines for Data Co-operatives” (adapted from the ADMA Privacy Principles for Data Co-operatives) www.marketing.org.nz (accessed 15 December 2009). The guidelines provide that “sensitive information” cannot be used by a data co-operative without proof of express consent, and that shared data may only be transferred to other countries where the data will be used consistently with the Privacy Act 1993.

1362 Inaugural List Warranty Register participants are Acxiom, DataMarket, New Zealand Post, Veda Advantage and PMP Micromarketing.

1363 Marketing Association “List Warranty Register” www.marketing.org.nz (accessed 15 December 2009).

1364 Code of Practice of the Market Research Society of New Zealand Inc, revised June 2008.

are never to allow personal data collected in a market research project to be used for any purpose other than market research. However, some market research may be carried out by non-members who are not bound by the code.

OVERSEAS REGULATORY CONTROLS

Privacy principles and data protection legislation dealing with direct marketing

15.26 The EU Data Protection Directive requires direct marketers to inform people that their data may be collected and used for direct marketing, and to give them the right to opt out.¹³⁶⁵ The Data Protection Act (UK) contains an express right to prevent processing for purposes of direct marketing:¹³⁶⁶

An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject.

15.27 The United Kingdom has also enacted a specific direct marketing regime within the Privacy and Electronic Communications (EC Directive) Regulations 2003. These regulations supplement the Data Protection Act¹³⁶⁷ and provide for direct marketing controls on:

- the use of automated calling systems to make calls to individual or corporate subscribers without prior consent;¹³⁶⁸
- the use of fax machines to send direct marketing messages to individual or corporate subscribers;¹³⁶⁹
- unsolicited calls to individual or corporate subscribers if a subscriber has opted out;¹³⁷⁰ and
- unsolicited email to individual subscribers without prior consent.¹³⁷¹

15.28 The regulations also require the Office of Communications (Ofcom)¹³⁷² to maintain a do-not-fax (FPS) register¹³⁷³ and a do-not-call (Telephone Preference Service or TPS) register of phone numbers (including mobile numbers) where

1365 European Parliament and Council Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and the Free Movement of such Data [1995] OJ L281.

1366 Data Protection Act 1998 (UK), s 11.

1367 If personal data is processed for marketing (e.g. if the name of the person receiving the message is known), compliance with the Data Protection Act is required. In addition, any direct marketing has to comply with the regulations (not just direct marketing involving the processing of personal information).

1368 Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 19.

1369 Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 20 requires opt-in for individual subscribers and allows opt-out for corporate subscribers.

1370 Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 21.

1371 Although there is a “soft opt-in” exception that allows direct marketing where contact details are obtained in the course of a sale or negotiations for sale of a product or service, the direct marketing relates only to similar products and services and a simple means of opt-out is given on each occasion: Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 22.

1372 Ofcom is the UK telecommunications and broadcasting regulator.

1373 Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 25.

subscribers (individual or corporate) do not wish to receive unsolicited calls.¹³⁷⁴ There is no exemption from the TPS for not-for-profits. Enforcement of the regulations is through extension of Part V of the Data Protection Act.¹³⁷⁵

15.29 In Germany, a recent amendment to the Federal Data Protection Act requires marketers to get consumers' consent to use their address data unless:

- the brand has an existing relationship with the consumer; or
- the source of the third party data is clearly stated on the direct mail envelope.

There are also exemptions for business-to-business marketing, charity direct marketing, political direct marketing and using data from public directories to market a company's own products.¹³⁷⁶

15.30 In Australia, the National Privacy Principles (NPPs) (which apply to the private sector) deal with the issue of direct marketing by organisations as part of the use and disclosure principle.¹³⁷⁷ NPP 2.1(c) permits the use of personal information for the secondary purpose of direct marketing only if:

- the information in question is not "sensitive information";
- it is impracticable to seek the individual's consent;
- the organisation will not charge the individual for giving effect to a request by the individual not to receive direct marketing communications;
- the individual has not requested the organisation to refrain from providing direct marketing communications;
- in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that the individual may express a wish not to receive any further direct marketing communications; and
- each written direct marketing communication to the individual sets out the organisation's business address and telephone number and, if the communication is made by electronic means, a number or address at which the organisation can be contacted electronically.

15.31 In addition to direct marketing permitted by NPP 2.1(c), there are other circumstances in which the use or disclosure of personal information for direct marketing is permitted under the NPPs. These are where:

- the individual consents to the direct marketing;
- the information was collected for the primary purpose of direct marketing; or
- the direct marketing is related (or directly related in the case of sensitive information) to the primary purpose of collection, and the individual concerned would reasonably expect the organisation to use or disclose the information for direct marketing.

¹³⁷⁴ Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 26.

¹³⁷⁵ As well as dealing with various forms of direct marketing, the regulations also deal with a range of other matters.

¹³⁷⁶ Noelle McElhatton "German direct marketers grapple with new opt-in law" (5 August 2009) *Marketing Direct* www.brandrepublic.com (accessed 25 February 2010).

¹³⁷⁷ Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) para 26.9.

15.32 The ALRC has recommended that direct marketing be dealt with in the Australian Privacy Act under a specific privacy principle:¹³⁷⁸

UPP6.1 Direct marketing (only applicable to organisations)¹³⁷⁹

6.1 An organisation may use or disclose personal information about an individual who is an existing customer aged 15 years or over for the purpose of direct marketing only where the:

- (a) individual would reasonably expect the organisation to disclose the information for the purpose of direct marketing; and
- (b) organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications.

6.2 An organisation may use or disclose personal information about an individual who is not an existing customer or is under 15 years of age for the purpose of direct marketing only in the following circumstances:

- (a) either the:
 - (i) individual has consented; or
 - (ii) information is not sensitive and it is impracticable for the organisation to seek the individual's consent before that particular use or disclosure;
- (b) in each direct marketing communication, the organisation draws to the individual's attention, or prominently displays a notice advising the individual, that he or she may express a wish not to receive any further direct marketing communications; and
- (c) the organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications; and
- (d) if requested by the individual, the organisation must, where reasonable and practicable, advise the individual or the source from which it acquired the individual's personal information.

6.3 In the event that an individual makes a request of an organisation not to receive any further direct marketing communications, the organisation must:

- (a) comply with the requirement within a reasonable period of time; and
- (b) not charge the individual for giving effect to the request.

The Australian Government has accepted this recommendation with some minor amendments.¹³⁸⁰

15.33 In Queensland, the Information Privacy Act 2009 requires decision makers to take steps to protect personal information before disclosing it if they reasonably believe the recipient of the information will use it to market directly to an individual.¹³⁸¹

1378 Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* (ALRC R108, Sydney, 2008) recommendation 26.1.

1379 An "organisation" includes an individual, body corporate, partnership, unincorporated entity and a trust.

1380 Australian Government *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108* (Canberra, 2009) 56.

1381 Information Privacy Act 2009 (Qld), sch 3, cl 11(4).

Do Not Call registers

- 15.34 In the United States, the Federal Trade Commission (FTC) established a do-not-call register in 2003 and has over 191 million registrations.¹³⁸² The US register does not apply to charities, market research companies or political polling. Marketing is also permitted if there is an existing business relationship, for a limited 18 month period, unless the consumer opts out.
- 15.35 A Do Not Call List has also been established in Canada.¹³⁸³ There are exemptions for charities, political parties, newspaper subscriptions and surveys. There have been some problems with the Do Not Call list such as misuse, lack of oversight, and inadequate policing mechanisms.¹³⁸⁴ It has since been reported that the Do Not Call List is to be replaced by giving consumers the chance to opt in, rather than opting out of telemarketing schemes, under the proposed anti-spam Electronic Commerce Protection Act.¹³⁸⁵
- 15.36 In Australia, the Do Not Call Register Act 2006 took effect in May 2007.¹³⁸⁶ Individuals can list their Australian fixed line or mobile phone numbers on the DNC Register, provided that those numbers are used mainly for private or domestic purposes. Registration allows individuals to opt out of receiving a wide range of direct marketing calls.¹³⁸⁷ Registrations are valid for 3 years and can be withdrawn at any time. In addition, the Australian Communications and Media Authority (ACMA) has issued a national industry standard for telemarketing and research calls which restricts the times of day at which calls may be made.¹³⁸⁸ The full direct costs of operating and maintaining the DNC register are recovered from industry through fees for accessing the register that are set using cost-recovery principles.¹³⁸⁹
- 15.37 From 31 May 2007, it became illegal, in the absence of consent, for any non-exempt telemarketer in Australia and overseas to contact a number listed on the register. ACMA is responsible for overseeing the register's operation and investigating breaches.¹³⁹⁰ Enforcement options include issuing a formal warning,

1382 Federal Trade Commission *Biennial Report to Congress Pursuant to the Do Not Call Registry Fee Extension Act of 2007* (December 2009) 3.

1383 An Act to Amend the Telecommunications Act 2005 c 40 came into force on 30 June 2006.

1384 See Chris Connolly and Amy Vierboom *Emerging Best Practice in Do Not Call Registers* (Galexia, Sydney, 2009) 5–6. A privacy commentator, Michael Geist set up the iOptOut website to highlight the shortcomings of the Do Not Call List: Michael Geist “Do-not-call faces challenges” (7 April 2008) *thestar.com* www.thestar.com (accessed 9 April 2008).

1385 Michael Geist “The Untold Story of Do-Not-Call Enforcement (aka Why Killing Do-Not-Call Can’t Come Fast Enough)” (27 April 2009) www.michaelgeist.ca (accessed 19 May 2009).

1386 500,000 Australians signed up in the first 3 days of the register's operation.

1387 A survey found that 79 per cent of people surveyed reported fewer telemarketing calls since registering their home number on the Do Not Call Register: Australian Communications and Media Authority “Community Attitudes to Unsolicited Communications” (Newspoll Research Report, Sydney, 2009) 30.

1388 Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 (Cth).

1389 Australian Communications and Media Authority “ACMA invites comment on new industry fees and payment methods to access the Do Not Call Register in 2009–10” (24 March 2009) Media Release 35/2009.

1390 ACMA has reported a 60 per cent drop in complaints about calls to numbers on the Do Not Call Register, indicating a significant improvement in compliance by telemarketers: Australian Communications and Media Authority “Complaints about unwanted telemarketing calls plummet” (6 July 2009) Media Release 81/2009.

accepting enforceable undertakings, issuing an infringement notice, which specifies a financial penalty, or commencing proceedings in the Federal Court or Federal Magistrates Court.¹³⁹¹ The Australian Do Not Call scheme is currently under review.¹³⁹²

- 15.38 While national legislation cannot necessarily protect against direct marketing calls from other countries, it does offer some recourse against the use of offshore call centres by local companies. In Australia, an Australian company was penalised under the Do Not Call Register legislation after an offshore call centre made calls on its behalf to numbers on the Do Not Call Register.¹³⁹³ The Federal Trade Commission also states that it can take action against US companies that solicit sales through overseas telemarketers.¹³⁹⁴
- 15.39 In New Zealand, there is a voluntary scheme, in the form of the Marketing Association Do Not Call scheme which members of the Association are obliged to check against any prospective marketing list for new customers. The scheme relies on members' internal complaint handling procedures. Because of the limitations of the voluntary scheme, there have been calls for a comprehensive legislative scheme. The Privacy Commissioner has recommended that consideration be given to the merits of a national system, established under statute, to control the use of automated dialling machines and enable individuals to opt out of telemarketing.¹³⁹⁵
- 15.40 The Marketing Association has argued that a government-run register is unnecessary. Its Do Not Call scheme has about 44,000 numbers on it and about 500 are added each month.¹³⁹⁶ While the Privacy Commissioner has been supportive of industry initiatives directed towards better practices, the association's register only applies to its own members and so does not control telemarketing by non-members. Massey Marketing professor Janet Hoek has called for do-not-call legislation, arguing that the New Zealand Marketing Association register is not widely publicised and many consumers would not know of its existence:¹³⁹⁷

Government regulation is more visible and the options it creates are better known. In addition, government regulation is pro-active rather than reactive; unlike self-regulation it provides explicit compliance incentives in the form of penalties, and, most importantly, it is completely independent, which promotes consumer confidence in the outcomes.

1391 Australian Communications and Media Authority "Dodo pays penalty for calling numbers on the Do Not Call Register – Background" (22 October 2008) Media Release.

1392 Australian Government Department of Broadband, Communications and the Digital Economy *Discussion Paper: Do Not Call Register Statutory Review* (Canberra, 2009).

1393 See also "Frequently Asked Questions About the Do Not Call Register: Are telemarketing calls from overseas covered by the register?" www.donotcall.gov.au (accessed 19 May 2009).

1394 Federal Trade Commission "Q&A: The National Do Not Call Registry: Q32: Are telemarketing calls from overseas covered?" www.donotcall.gov (accessed 13 January 2010).

1395 *4th supplement to Necessary and Desirable* recommendation 25B; Claire Trevett "Database Suggested to Limit Cold Calls" (5 July 2008) *New Zealand Herald* Auckland www.nzherald.co.nz (accessed 25 February 2010).

1396 See Chris Connolly and Amy Vierboom *Emerging Best Practice in Do Not Call Registers* (Galexia, Sydney, 2009) 10, noting that countries such as New Zealand that rely on self-regulatory options have very low numbers of registered numbers, compared to government run registers.

1397 Massey University "Call for Laws Banning Tele-marketers" (8 May 2007) Press Release.

- 15.41 The United Future Party has announced a party policy to create a national Do Not Call register to apply to all profit-making companies, and to ban telemarketers from calling anyone after 9pm or on Sundays.¹³⁹⁸

REFORM OPTIONS

- 15.42 The current regulatory regime for direct marketing in New Zealand consists of a number of elements:
- a comprehensive regime for direct marketing by email under the Unsolicited Electronic Messages Act that requires consumer opt-in to authorise unsolicited commercial messages, including an enforcement regime administered by the Department of Internal Affairs;
 - coverage under the Privacy Act to the extent that information used for marketing approaches is personal information, with a complaints procedure administered by the Privacy Commissioner; and
 - voluntary Marketing Association Code of Practice including Do Not Call and Do Not Mail schemes that provide an opt-out option for consumers.

With regard to the Marketing Association Code, enforcement relies on members' own internal complaint-handling procedures, and the Code does not apply to non-member marketers.

- 15.43 The issue we have identified is whether the gaps in the current regulatory regime are such that a reform option should be considered. In our view, an efficient user-friendly remedy for people affected by direct marketing approaches of various kinds should be available. While such a remedy is available in the case of electronic commercial spam and under the Marketing Association DNC and DNM schemes, these cover specific types of direct marketing (email) or specific participants (members of the Marketing Association) rather than providing a comprehensive remedy. The Privacy Commissioner's complaints process does not currently lend itself to marketing complaints and is only available where marketing is based on the use of personal information. Various exceptions to the privacy principles also reduce the scope for complaints about direct marketing to be made under the Privacy Act. We raise a number of possible reform options for consideration. In addition to these, our proposal in chapter 8 that the Commissioner be able to issue enforcement notices is likely to be a useful remedy in relation to direct marketing.
- 15.44 As we have noted, there is currently a separate regime for unsolicited email. It may be worth considering as part of any reform whether the treatment of spam should be aligned with the treatment of direct marketing using other media.

Privacy Act: introducing a right to opt out of direct marketing

- 15.45 There are a number of ways in which the Privacy Act could be amended to provide individuals with a mechanism to be able to opt out from direct marketing. This could be by:
- introducing a new direct marketing privacy principle (as per the ALRC's recommendation);
 - providing for the right to opt out in a section of the Privacy Act (as per the UK Data Protection Act);

¹³⁹⁸ United Future NZ Party "Do Not Call' register United Future policy" (14 July 2008) Press Release.

- providing an additional limit on disclosure for the purpose of direct marketing (as per the Queensland Information Privacy Act);
- supplementing principle 7 (the correction principle) with a right to block the use of personal information for direct marketing purposes (as recommended by the Privacy Commissioner);¹³⁹⁹
- issuing a Code of Practice that could adapt the privacy principles and their exceptions as they apply to direct marketing (such as notice and consent), address the use of sensitive personal information for marketing purposes, and provide for individuals to have the ability to opt out; or
- amending Schedule 2 to the Telecommunications Information Privacy Code 2003 to allow subscribers to opt out of marketing based on use of subscriber directories.¹⁴⁰⁰

Any of these options would require agencies to maintain their own do not contact lists to keep track of consumers who have opted out and would allow consumers to opt out of direct marketing on a case-by-case basis.

Do Not Call register

15.46 This option would involve a centralised Do Not Call register, allowing consumers to effect a comprehensive opt-out from telemarketing, rather than company-by-company. Consumers could then opt in to direct marketing by particular companies on a selective basis. Options to consider are:

- continuing with the voluntary approach under the Marketing Association Do Not Call scheme (status quo);
- retaining voluntary membership of the Marketing Association, while requiring all marketers by statute to comply with the Do Not Call scheme; and
- setting up a statutory Do Not Call scheme with enforcement processes.

15.47 If a statutory scheme is proposed, consideration would need to be given to the following matters:

- the statutory vehicle that would establish the register (the Privacy Act or separate legislation or regulation);
- the responsible agency to administer the register (the Privacy Commissioner, a consumer protection agency or another agency), bearing in mind that the regulator and the operator of the register need not necessarily be the same agency; and
- whether the statutory scheme would be established on a self-funding basis or whether, and if so how, the scheme would require respective contributions by industry and government.

Scope of regulatory measures

15.48 In relation to the possible options outlined above, consideration would need to be given to whether there should be different requirements depending on whether the marketing is commercial or non-commercial (such as charitable,

¹³⁹⁹ *Necessary and Desirable* recommendation 25.

¹⁴⁰⁰ See for example the proposal of the South African Law Reform Commission *Project 124: Privacy and Data Protection: Report* (Pretoria, 2009) 365–366.

not-for profit, political or market research). For example, the Unsolicited Electronic Messages Act covers all forms of spam, but imposes additional requirements in relation to commercial spam.¹⁴⁰¹

Q167 Are any regulatory controls on direct marketing needed? If so, which forms of direct marketing require further controls:

- telemarketing;
- unsolicited mail;
- door-to-door marketing;
- autodialing;
- electronic spam;
- fax marketing;
- charitable solicitations;
- political donation solicitations; or
- other?

Q168 Which regulatory option or options do you favour:

- a direct marketing principle in the Privacy Act;
- a right to opt out of direct marketing in the Privacy Act, a Privacy Act code of practice, or regulations;
- a voluntary or compulsory Do Not Call Register for telemarketing; or
- any other option?

BEHAVIOURAL INTERNET ADVERTISING

- 15.49 Behavioural internet advertising is targeted internet advertising, based on information collected from people's use of the internet.¹⁴⁰² Information collected can include Web sites and pages within those sites visited by an individual, the time and duration of the visits, search terms entered into search engines, internet purchases, and responses to advertisements.¹⁴⁰³ It is a process which is typically invisible to consumers.¹⁴⁰⁴ The information is collected from online searches and web browser profiles created by search engines such as Google and network advertisers through the use of cookies and Web bugs.¹⁴⁰⁵
- 15.50 The stated benefits of behavioural advertising include free online content supported by advertising, personalisation of ads, and the potential reduction in unwanted advertising, while stated privacy risks include invisibility of data collection and the shortcomings of current disclosure practices, the potential to develop and store detailed profiles, and the risk that data is used for unanticipated

1401 Unsolicited Electronic Messages Act 2007, ss 10 and 11.

1402 See New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19, Wellington, 2008) 128–130.

1403 Federal Trade Commission *Online Profiling: a Report to Congress* (Washington, DC, 2000) 4.

1404 Federal Trade Commission Staff Report *Self-Regulatory Principles for Online Behavioural Advertising* (Washington, DC, 2009) ii.

1405 In relation to online profiling, see Federal Trade Commission *Online Profiling: a Report to Congress* (Washington, DC, 2000); Electronic Privacy Information Center "Privacy and Consumer Profiling" www.epic.org (accessed 22 June 2009).

purposes or falls into the wrong hands.¹⁴⁰⁶ Some people view targeted advertising as more useful and less annoying than random ads, especially if they are offered discounts. But others are uneasy about the collection of details of their internet usage, finding it intrusive: “An extensive data collection and targeting infrastructure has emerged, one that poses significant threats to the privacy – and personal autonomy – of hundreds of millions”.¹⁴⁰⁷ One commentator has suggested that: “The question boils down to this: How much information – and what type of information – should companies be able to collect and utilise about people while they are online?”¹⁴⁰⁸ Another industry commentator notes: “We have to work out in society what we believe is a good exchange.”¹⁴⁰⁹ Several mergers between US internet companies and advertising companies have intensified concerns about the exploitation of consumer data for advertising purposes.

- 15.51 Specific types of behavioural advertising include (i) “first party” or “intra-site” behavioural advertising where a website collects consumer information to deliver targeted advertising at its site, but does not share any information with third parties; and (ii) contextual advertising which targets advertisements based on the Web page a consumer is viewing or a search query the consumer has made, but involves little or no data storage. The more privacy-intrusive form of behavioural advertising, however, is the tracking of consumers by network advertisers via cookies on multiple websites which then serve advertisements based on the consumer’s web-based interactions:¹⁴¹⁰

Every web page’s individual views, every word typed in a search query box (also known as the “database of consumer intentions”), every video download, and every word in an email may create one more data point that a marketer can leverage and use to more precisely target the audience with customized media placement and messaging.

- 15.52 Behavioural advertising by internet service providers uses deep-packet inspection rather than the cookie-based model. Deep-packet inspection is even more wide reaching as it can allow the targeting of ads based on substantially all the websites a consumer visits rather than a more limited number of websites visited within a network of particular websites.¹⁴¹¹

1406 Federal Trade Commission Staff Report *Self-Regulatory Principles for Online Behavioural Advertising* (Washington, DC, 2009) i–ii.

1407 Center for Digital Democracy and the US Public Interest Research Group “Complaint and Request for Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices” (Washington, DC, 2006) 48. A Californian study found that 85 per cent of respondents thought that sites should not be allowed to track their behaviour around the Web to show them ads: see Louise Story “To Aim Ads, Web is Keeping Closer Eye on You” (10 March 2008) *New York Times* www.nytimes.com (accessed 11 March 2008).

1408 Renee Boucher Ferguson “A Battle is Brewing Over Online Behavioural Advertising” (27 March 2008) www.eweek.com (accessed 13 January 2010).

1409 Zachary Britton, quoted in Associated Press “Doubts arise over ISP ad targeting” (2 September 2008) *The Sydney Morning Herald* www.smh.com.au (accessed 3 September 2008).

1410 Center for Digital Democracy and the US Public Interest Research Group “Supplemental Statement in Support of Complaint and Request for Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices” (Washington, DC, 2007) 5.

1411 Deep packet inspection is discussed in chapter 13.

Behavioural advertising and personal information

15.53 Behavioural advertising does not fit neatly into the data protection framework because the information collected for profiling purposes may not be “personal information” as defined in the Privacy Act. The information collected often does not include the consumer’s name, physical address or similar identifier that could be used to identify the consumer in the offline world. Instead, businesses generally use cookies to track consumers’ activities and associate those activities with a particular computer or device.

15.54 Privacy advocates have suggested that personal information in this context should be any information that can, directly or indirectly:¹⁴¹²

- identify an individual, including but not limited to name, address, IP address, assigned identifier, or a combination of unique or non-unique identifying elements associated with a particular individual that can be reasonably associated with a particular individual; or
- permit a set of behaviours or actions to be consistently associated with a particular individual or computer user, even if the individual or computer user is never identified by name or other individual identifier.

Similarly, the Federal Trade Commission has commented that in the context of online behavioural advertising, the traditional notion of what constitutes personal information is becoming less and less meaningful and should not, by itself, determine the protections provided for consumer data.¹⁴¹³

15.55 In the United Kingdom, the view of the Information Commissioner is that profiles based on information collected by cookies which is then linked to other information which uniquely identifies the individual is personal information and is covered by the Data Protection Act.¹⁴¹⁴

15.56 In chapter 3 we discuss whether Internet Protocol addresses can be considered to be personal information, and note that this depends on a case-by-case assessment.

1412 Center for Democracy and Technology, Consumer Action, Consumer Federation of America, Electronic Frontier Foundation, Privacy Activism, Public Information Research, Privacy Journal, Privacy Rights Clearinghouse and World Privacy Forum Submission to Federal Trade Commission in advance of Town Hall, “Behavioural Advertising: Tracking, Targeting and Technology” (Washington, DC, 1–2 November 2007) www.worldprivacyforum.org (accessed 16 December 2009).

1413 Federal Trade Commission Staff Report *Self-regulatory principles for online behavioural advertising* (Washington, DC, 2009) 21.

1414 Information Commissioner’s Office (UK) *Data Protection Good Practice Note: Collecting personal information using websites* (London, 2007).

Regulatory and other responses to behavioural advertising

15.57 Arguments have been made against additional regulation for online behavioural advertising:¹⁴¹⁵

Good public policy requires that the benefits of more information be balanced against the benefits of greater privacy. Regulation should be undertaken only if a market is not functioning properly and if the benefits of new measures outweigh their costs. Our analysis suggests that proposals to restrict the amount of information available would not yield net benefits for consumers.

15.58 Nevertheless, in various countries, there have been a range of regulatory responses and proposals in relation to the issue of behavioural advertising.

European Union

15.59 The EU has called for advertisers to come up with a voluntary code of conduct to protect consumer and privacy rights but has signalled that EU authorities will probably have to legislate to prevent abuses. New EU legislation will require users to consent to cookies being stored on their computers.¹⁴¹⁶

United Kingdom

15.60 The Internet Advertising Bureau (IAB) has developed Good Practice Guidelines for Online Behavioural Advertising, based on the three core principles of notice, user choice and education.¹⁴¹⁷ Each IAB member is to:

- provide clear and unambiguous notice that it collects data for the purposes of online behavioural advertising;
- provide an approved means for consumers to decline online behavioural advertising from that member;
- provide a clear and unavoidable statement to the user about the product and offer the user a choice about whether or not to be involved, where specific consent to the collection and use of data for online behavioural advertising is required by law;
- make information available and easily accessible to educate users about online behavioural advertising; and
- refrain from creating online behavioural advertising segments intended for the sole purpose of targeting children under the age of 13.

The principles are stated to complement and in some cases supplement the UK legal framework provided by the Data Protection Act and the Privacy and Electronic Communications Regulations. The Privacy and Electronic

1415 Thomas M Lenard and Paul H Rubin *In Defense of Data: Information and the Costs of Privacy* (Technology Policy Institute, Washington, DC, 2009).

1416 “Europe Approves New Cookie Law” (11 November 2009) <http://blogs.wsj.com> (accessed 13 November 2009).

1417 Internet Advertising Bureau *Good Practice Guidelines for Online Behavioural Advertising* www.iabuk.net (accessed 7 December 2009).

Communications (EC Directive) Regulations 2003, prohibit the use of cookies and tracking systems to collect any information without notice and the opportunity to opt out (subject to exceptions).¹⁴¹⁸

- 15.61 The All-Party Parliamentary Communications Group has conducted an inquiry considering such questions as whether the Government should be intervening over behavioural advertising services, either to encourage or discourage their deployment, or whether this is a matter for individual users, internet service providers and websites. As a result of the inquiry, the Group (comprising MPs and Lords from all parties) called for a change in the law to make it illegal to engage in behavioural advertising without an internet user's explicit, informed consent. The Group considered the IAB Good Practice Guidelines to be inadequate as they are based on the idea of opt-out rather than explicit opt-in. Behavioural targeting of children and young people was a particular concern.¹⁴¹⁹
- 15.62 The Office of Fair Trading has launched a market study into online targeting of advertising and pricing which will cover behavioural advertising and customised pricing.¹⁴²⁰ This may ultimately lead to an industry code of practice.

United States

- 15.63 The Federal Trade Commission (FTC) has been examining behavioural advertising and the privacy issues raised over a number of years, conducting a series of public workshops,¹⁴²¹ issuing reports, and bringing enforcement actions challenging deceptive privacy claims and improper disclosure of consumer data.¹⁴²²
- 15.64 In February 2009 the FTC released "Self-Regulatory Principles for Online Behavioural Advertising" following extensive consultation with stakeholders. The principles promote prominent disclosure separate to privacy policies, ideally combined with education programmes. The governing concepts of the principles are:
- transparency and control: companies collecting information for behavioural advertising should provide meaningful disclosures to consumers about the practice and choice about whether to participate;
 - reasonable security and limited data retention;
 - material changes to privacy policies: before a company uses behavioural data in a way that is materially different from promises made when the data was collected, it should obtain express consent from the consumer; and

1418 Privacy and Electronic Communications (EC Directive) Regulations 2003 (UK), reg 6.

1419 All Party Parliamentary Communications Group *Can we keep our hands off the net? Report of an Inquiry by the All Party Parliamentary Communications Group* (London, 2009).

1420 Office of Fair Trading (UK) "OFT launches market studies into advertising and pricing practices" (15 October 2009) Press Release 126/09. It is expected that the study will be completed by the UK summer 2010.

1421 A Privacy Roundtable on privacy issues posed by technology and business practices that collect and use consumer data, including behavioural advertising, was held on 9 December 2009. See Federal Trade Commission www.ftc.gov (accessed 17 December 2009).

1422 For example, an enforcement action was brought against Sears for failing to adequately disclose the scope of personal information collected via a downloadable software application that not only tracked online browsing but also monitored online secure sessions and some computer activities not related to the internet. See Federal Trade Commission "Sears Settles FTC Charges Regarding Tracking Software" (6 April 2009) www.ftc.gov (accessed 22 June 2009).

- consent prior to use of sensitive data (opt-in), such as information about children, health and finances.
- 15.65 The principles are not limited to personal information but include any data collected for online behavioural advertising that could reasonably be associated with a particular consumer or with a particular computer or device. The FTC has recently made addressing behavioural targeting a high priority and has signalled that there may be changes, which may or may not involve regulation.¹⁴²³
- 15.66 Congress has also held hearings into online advertising and deep packet inspection.¹⁴²⁴ While the collection of online information from children is restricted under the Children’s Online Privacy Protection Act, various Bills to regulate online behavioural advertising to the general population have been and continue to be drafted. Recent legislative proposals would require that websites that collect information about visitors, or use an outside company to do so, in order to target advertising would be required to prominently disclose what information they gather and how it is used.¹⁴²⁵ Visitors would be required to be able to opt out of having their data collected. Furthermore, websites that share user information with outside advertising networks would be required to obtain user approval before collecting data, except in certain cases. Websites that collect sensitive personal information would also be required to obtain consent first.
- 15.67 Privacy groups have proposed a Do Not Track List, administered by the FTC. One survey found 72 per cent of American internet users would opt out of online tracking if they could.¹⁴²⁶ The Future of Privacy Forum has announced a major research initiative to examine different methods for communicating with users about online advertising and privacy practices, and will explore potential tools and notices that companies could use to raise consumer awareness about the use of online behavioural advertising data.¹⁴²⁷
- 15.68 The Code of Practice for Direct Marketing in New Zealand provides that:
- when consumers are required to provide personal information on a website, they must be given the opportunity to choose not to have such information made available to others for marketing purposes;¹⁴²⁸ and

1423 See, for example, Stephanie Clifford “Fresh Views at Agency Overseeing Online Ads” (5 August 2009) *New York Times* www.nytimes.com (accessed 25 February 2010). See also critique and recommendations of the Center for Democracy and Technology “Online Behavioural Advertising: Industry’s Self-regulatory Framework is Necessary, But Still Insufficient on its Own to Protect Consumers” www.cdt.org (accessed 13 January 2010).

1424 Stephanie Clifford “Congress Looks into how Online Companies Track Consumers” (18 June 2009) <http://mediadecoder.blogs.nytimes.com> (accessed 25 February 2010).

1425 See, for example, Kate Kaye “Web Privacy Bill could come by November” (1 October 2009) www.clickz.com (accessed 5 October 2009).

1426 Joseph Turow, Jennifer King, Chris Jay Hoofnagle, Amy Bleakley and Michael Hennessy *Americans Reject Tailored Advertising and Three Activities That Enable It* (Social Science Research Network Working Paper, 2009) 10.

1427 “Future of Privacy Forum Announces Research Initiative to Develop Effective Messages to Communicate with Users About Online Data Use” (19 May 2009) www.futureofprivacy.org (accessed 17 June 2009).

1428 Marketing Association of New Zealand “Code of Practice for Direct Marketing in New Zealand” principle 5(d).3.

- consumers are to be advised if information that could identify them is collected that will be linked with click-stream data (such as that obtained from their behaviour, pathway or choices expressed when visiting a website) and how it will be used.¹⁴²⁹

Industry responses

- 15.69 Some companies, including Google, Yahoo! and Microsoft, have developed tools to allow consumers to opt out of receiving targeted online advertisements.¹⁴³⁰ Other technologies available include opt-out cookies, a technical means of opting out of targeted advertising, and cookie alternatives.¹⁴³¹ Another proposed measure is to develop a symbol that advertisers would display on advertisements to denote that they collect data from users.¹⁴³²

Reform Options

- 15.70 The practice of collecting information from internet use to deliver targeted advertising raises the following issues:
- it is not always transparent to internet users that data generated by their internet activity will be collected and used for marketing purposes;
 - Privacy Act coverage can be uncertain due to the limits of the definition of “personal information,” as well as cross-border issues;¹⁴³³ and
 - while the practice is covered by voluntary standards to some extent, application of the standards depends on whether personal information is also collected and not on the collection of click-stream data per se, observance of these standards is limited to Marketing Association members, and the standards rely on internal complaint-handling procedures rather than statutory enforcement processes.
- 15.71 Possible responses to behavioural advertising might include the following:
- The Privacy Commissioner could continue to provide information to consumers about behavioural advertising to increase awareness of the practice and its privacy implications, and options for consumers to protect their online privacy.
 - The Privacy Commissioner could issue information or guidance about how the privacy principles apply to behavioural advertising and encourage privacy-friendly practices including privacy-enhancing technologies.
 - The Privacy Commissioner could make statements about behavioural targeting practices that are privacy-intrusive.

1429 Marketing Association of New Zealand “Code of Practice for Direct Marketing in New Zealand” principle 5(d).5.

1430 See Saul Hansell “A Guide to Google’s New Privacy Controls” (12 March 2009) <http://bits.blogs.nytimes.com> (accessed 25 February 2010).

1431 See Stephanie Olsen “New Technology Serves Ads Sans Cookies” (3 April 2009) *CNET News* <http://news.cnet.com> (accessed 12 June 2009); Daniel C Howe and Helen Nissenbaum “Trackmenot: Resisting Surveillance in Web Search” in Ian Kerr, Carole Lucock and Valerie Steeves (eds) *Lessons from the Identity Trail: Privacy, Anonymity and Identity in a Networked Society* (Oxford University Press, New York, 2009).

1432 See, eg, Saul Hansell “Seeking a Symbol for ‘This Ad Knows About You’” (3 December 2009) <http://bits.blogs.nytimes.com> (accessed 25 February 2010).

1433 Cross-border issues are discussed in chapter 14.

- The Privacy Commissioner could call on the Marketing Association and/or the Advertising Standards Authority to develop voluntary standards drawing on standards developed overseas that meet with her approval.
- The Privacy Commissioner could invite the Marketing Association and/or the Advertising Standards Authority to develop a Code of Practice for behavioural advertising for approval under the Privacy Act.
- Legislative changes to the Privacy Act could be considered.

It may be preferable to see what form of regulation emerges in other jurisdictions before implementing higher level regulatory options such as legislative change.

Q169 Do you have any comments about the privacy issues associated with online behavioural targeting? What, in your view, is the appropriate regulatory response to these issues?