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98/13190B



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1 September 1998

Mr. John O'Neil
 Senior Assistant Commissioner
 Australian Competition & Consumer Commission
 c/- Regional Director
 Level 35
 The Tower
 360 Elizabeth Street
MELBOURNE VIC 3000



Adelaide Brisbane Cairns
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 Hanoi Ho Chi Minh City

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Dear Mr. O'Neil

Australian Direct Marketing Association Ltd (ACN 002 909 800) Authorisation Application

I act for the Australian Direct Marketing Association Ltd. I enclose for lodgement an application for authorisation, together with a cheque for the lodgement fee of \$7,500.

Yours sincerely

Paul Holm
 Partner

Enc.

FILE No.	
ENTITY	5806185
DIAMAN	98/13190

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 88(1)

A 40077

AGREEMENTS AFFECTING COMPETITION:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the Trade Practices Act 1974 for an authorisation under that sub-section:

- to make a contract or arrangement, or arrive at an understanding a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act; and
- to give effect to such a provision.

1(a) Name of Applicant

Australian Direct Marketing Association Limited ("ADMA")
(ACN 002 909 800)
Suite 1
Level 5
100 William Street
East Sydney NSW 2011

1(b) Short description of business carried on by the applicant

ADMA is a non-profit industry body set up to represent the collective interests of its members. Its members comprise sole traders, bodies corporate, partnerships or unincorporated associations which carry on business, practise or engage in the direct marketing industry in Australia and persons employed or otherwise engaged in direct marketing industry in Australia.

The direct marketing industry includes:

- fundraisers who solicit donations from the public using a means of distance communication; and
- organisations which contract or propose to contract for the sale of goods or services to a customer where:
 - the customer is contacted through a means of distance communication; and
 - customers are invited to respond using a means of distance communication; and

- it is intended that the goods or services be supplied under a contract negotiated through a means of communicating at a distance; and
- a record of the transaction is captured and maintained on a list or database for further marketing purposes.

ADMA conducts advocacy, education and networking activities for the benefit of its members and administers a Code of Practice, compliance with which is compulsory for all members.

1(c) Address in Australia for service of documents on the applicant

c/- Paul Holm
Phillips Fox Lawyers
Level 50
120 Collins Street
Melbourne VIC 3000

2(a) Brief description of the contract, arrangement or understanding and, where already made, its date

It is proposed that a Code Authority be established to enforce the Code. The Authority will have wide discretionary powers including the power to demand undertakings, publish details of offending conduct, suspend or expel ADMA members and otherwise impose sanctions which may have adverse financial or competitive consequences for the member.

The contract, arrangement or understanding is contained in the proposed ADMA Direct Marketing Code of Practice which is annexed to this application and marked "A" (the "Code of Practice").

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

All members of ADMA and their employees, agents or sub-contractors are bound by the Code of Practice.

2(b) Names and addresses of other parties or proposed parties to the contract, arrangement or understanding

Each member of ADMA. If required, member name and address lists can be provided to the ACCC in confidence.

Names and addresses (where known) of parties and other persons on whose behalf the application is made

Each current and future member of ADMA.

4(a) Grounds for the grant of authorisation

The proposed arrangements in the Code of Practice which have the potential for anti-competitive detriment are:

- the conduct of ADMA members is restricted beyond that required by relevant State, Territory and Commonwealth legislation;
- the imposition of sanctions (including the revocation of membership of ADMA) where a member of ADMA is found to be in breach of the Code of Practice; and
- the imposition of sanctions against the member where an agent, or subcontractor of the member is found to be in breach of the Code of Practice.

The applicants contend that the following public benefits will result from the proposed arrangements:

- (i) Significant promotion and enhancement of consumer protection. The restrictions on the conduct of ADMA members will protect consumers by:
 - ensuring they have access to the product and service information they need to make informed choices;
 - respecting privacy;
 - promoting a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
 - protecting consumers from false, misleading or unsafe claims.
- (ii) Ensuring members put in place appropriate consumer complaint handling procedures.
- (iii) Providing consumers with a flexible complaints handling procedure in relation to alleged breaches of the Code by ADMA members.
- (iv) Responsible development of the direct marketing industry which will:
 - increase supply, provide consumers with more purchasing options, promote competition and market efficiency, thereby exerting downward pressure on prices; and
 - increase access to and demand from off-shore markets which will boost the volume of exports.

- (v) Promotion of consumer confidence to make purchasing decisions by a direct marketing method which:
 - will enable consumers to take advantage of more convenient methods of purchase; and
 - is likely to enable consumers to benefit from lower prices made possible by the lower cost structures required for direct marketing sales compared to shop-front retail sales.
- (vi) Consumer views being taken into account by the presence of a an independent chairman and consumer representatives on the Code Authority. Member sanctions recommended to the Board of Directors of ADMA by the Code Authority will therefore be a product of public input.
- (vii) The promotion of equitable dealings in the direct marketing industry.
- (viii) Improvement in the quality and consistency of the service received by consumers from direct marketers.

4(b) Facts and contentions relied upon in support of those grounds

Detriment

Some limited anti-competitive detriment is possible as the Code of Practice restricts the conduct of ADMA members beyond that required by relevant State, Territory and Commonwealth legislation. The Code of Practice is relatively prescriptive in respect of the following:

- the information to be provided when an offer is made to a potential customer and at the time of delivery;
- the procedures to be adhered to when delivery is delayed;
- the requirement to provide, in most cases, a cooling-off period of 7 days or more within which the customer may cancel the purchase contract (this is in addition to normal statutory rights);
- the requirement that telemarketers identify themselves to potential customers;
- limiting the times when telemarketers may telephone potential customers; and
- limiting the methods of collection of personal information and the use and disclosure of such information.

ADMA was established in 1966. The majority of prominent participants in the direct marketing industry are members of ADMA. ADMA currently represents over 400 organisations involved in *direct* marketing including financial institutions, publishers, catalogue and mail-order traders, airlines and travel service providers,

charities and fundraisers, call centres, and telecommunications service providers, printers and advertising agencies, list and data base specialists, mail houses and fulfilment services.

The applicants estimate that ADMA members are responsible for approximately 80% of annual sales derived from the use of direct marketing techniques.

Given the ADMA member profile, restrictions such as those listed above have the potential to standardise the way in which participants in the direct marketing industry conduct their business and engage in trade. Such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another and, as such, is anti-competitive.

The applicants contend that the standards and restrictions do not go beyond what are widely accepted as prudent and fair business practices. Furthermore, the standards and restrictions have no impact on the great scope direct marketing participants have to differentiate themselves via their products and the type of technology used to contact potential customers or transact a sale. Technological advancements, product development and the greater access to world markets has meant that the boundaries for such differentiation are limitless.

The applicants contend that the restrictions on the conduct of ADMA members is directed towards promoting the interests of consumers rather than the prevention of competition between members. The availability of sanctions for a breach of the Code of Practice is directed at encouraging compliance with the Code of Practice without unduly burdening ADMA members.

The applicants acknowledge that a significant number of participants in the direct marketing industry are members of ADMA. Therefore, the imposition of a sanction whereby a member has its membership of ADMA revoked has the potential to be anti-competitive. It is possible that the inability of a direct marketing industry participant to be a member of ADMA may mean that the participant suffers detriment as a result of the following:

- potential customers, whose policy is to deal only with an ADMA member, refusing to deal with the participant;
- the participant being denied access to the advocacy, education and networking activities conducted by ADMA; and
- members, whose policy is to deal only with other ADMA members, refusing to deal with a supplier.

Benefit

Most members of the public at some stage in the last year will have been contacted by or viewed advertisements of a direct marketer. At times, the person contacted may be a minor, intellectually impaired or have poor language skills. The person may not have chosen to be contacted by a direct marketer and may not have had sufficient opportunity to research the goods or services offered so as to minimise his or her risk of making an ill-informed purchasing decision. Further, there is an inherent risk associated with distance selling, due to there being no opportunity to inspect the goods prior to entering into a purchase contract. It is these characteristics of direct marketing that make the direct marketing industry different from the shop-front retail industry. It is also these characteristics which necessitate greater restriction on the conduct of direct marketing industry participants so that the disreputable acts of a few do not jeopardise the reputation of the majority. Public confidence is pivotal to the continued pattern of responsible growth in what is a relatively immature industry.

Potential customers in the direct marketing industry can be vulnerable and inexperienced in their response to an approach from a direct marketer. By developing the Code of Practice, ADMA is responding to a need to provide customers and potential customers with further, but not onerous, safeguards to protect their interests. ADMA also acknowledges that, in the absence of the Code of Practice, its members will lack guidance as to responsible and appropriate conduct with the probable result that the direct marketing industry will be harmed.

The use of sanctions, such as revocation of ADMA membership, is viewed by the applicants as necessary to deter irresponsible conduct and encourage compliance with the Code of Practice. Administration of the sanctions by the Code Authority and by the Board of Directors of ADMA will be undertaken with a high level of propriety, involving fairness and impartiality. The Code Authority will include consumer representatives and an independent chair. Such representation will ensure that its role is performed with propriety.

ADMA proposes to publicise widely the Code of Practice throughout the community and among business. ADMA hopes to raise the public awareness of the Code of Practice and instil an expectation about how industry participants will conduct themselves.

Based on the analysis of the detriment and public benefits outlined in this application, the applicants are firmly of the view that the proposed arrangements in the Code of Practice would result, or be likely to result, in a benefit to the public which would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed arrangements were given effect to.

5

This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding

5(a) Is this application to be so expressed?

No.

5(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding

Not applicable.

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application

Not applicable.

6(a) Does this application deal with a matter relating to a joint venture (see section 4J of the Trade Practices Act 1974)?

No.

6(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?


Not applicable.

6(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

61262431036

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 Name and address of the person authorised by the applicant to provide additional information in relation to this application

Paul Holm or Fiona Griffiths, Phillips Fox Lawyers, Level 50, 120 Collins Street,
Melbourne 3000

Dated:

1 September
August 1998

Signed on behalf of the applicant


.....
Signature

Paul Holm

Partner

Phillips Fox Lawyers

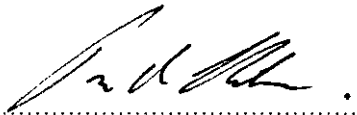
AUST. COMPETITION &
CONSUMER COMMISSION
CANBERRA
8 SEP 1998

Name and address of the person authorised by the applicant to provide additional information in relation to this application

Paul Holm or Fiona Griffiths, Phillips Fox Lawyers, Level 50, 120 Collins Street,
Melbourne 3000

Dated: August 1998

Signed on behalf of the applicant

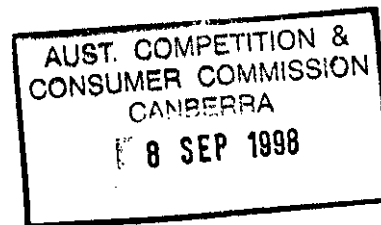


Signature

Paul Holm

Partner

Phillips Fox Lawyers



**AUSTRALIAN DIRECT MARKETING
ASSOCIATION LTD**
(ACN 002 909 800)

DIRECT MARKETING
Code of Practice

Suite 1, Level 5, 100 William Street
PO Box 464 Kings Cross NSW 1340
1/09/98

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A Introduction

What is the code?

- 1 The Code sets out specific 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 customers.
- 2 The requirements of the Code are based on common sense and are matters of fairness and honesty. The Code not only promotes fair trading but is intended to serve as a point of reference for direct marketers to ensure they comply with all applicable state and commonwealth fair trading laws.

Why is the code necessary?

- 3 Direct marketing is expanding rapidly. More consumers are choosing to purchase goods and services through direct response channels and more businesses are using these media to meet this increasing demand. Because they operate at a distance rather than face to face with their customers, direct marketers place a greater emphasis on building consumer confidence and trust. This is especially true in respect of their handling of personal data such as name, address and buying preferences.
- 4 The future expansion of direct marketing depends on the players conducting their business in a fair, honest and ethical manner. Only by doing so can the reputation of the industry be enhanced so that customer demand will continue to grow.

Statement of Objectives

- 5 The objectives of the Code are to:
 - 5.1 ensure customers have access to the product and service information they need to make informed choices;
 - 5.2 minimise the risk of direct marketers breaching the *Trade Practices Act* 1974 or state fair trading legislation;
 - 5.3 promote a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
 - 5.4 increase consumer confidence in doing business with ADMA members.

Scope of the code

- 6 The Code binds all ADMA members and all employees, agents or subcontractors of ADMA members.
- 7 An alleged breach of the Code by a member of ADMA, its employees, agents or subcontractors will be dealt with in accordance with the enforcement provisions of the Code.
- 8 If ADMA becomes aware of an alleged breach of the Code by a direct marketer who is not a member, ADMA bring the matter to the attention of the company concerned and seek compliance.
- 9 The Code requires members ensure their suppliers comply with the Code, by requiring that this is a condition of contracts between members and their suppliers.

Conflict with legislation

- 10 Where there is any conflict or inconsistency between the Code and any Commonwealth, State or Territory legislation, that legislation shall prevail to the extent of the conflict or inconsistency.

Citation

- 11 This Code may be cited as the ADMA Code of Practice.

B Standards of fair conduct

Marketing claims

Misleading or deceptive conduct

- 11 A direct marketer shall not make misleading or deceptive claims about an offer delivered through direct marketing whether by words, omission, illustration or any other means.

False claims

- 12 A direct marketer shall not:
- 12.1 make false or misleading claims with respect to the price or quality of goods or services;
 - 12.2 quote scientific or technical data in support of a claim, unless the data can be readily substantiated;
 - 12.3 use a false or misleading testimonial;
 - 12.4 advertise courses of instruction implying the promise of employment or remuneration where this cannot be guaranteed;
 - 12.5 promise outcomes where those outcomes have no safe scientific, medical or performance basis;
 - 12.6 overstate physical security risks; and
 - 12.7 describe goods or samples as "free" unless the goods or samples are supplied at no cost or no extra cost to the customer other than actual postage/carriage when specified.

Market research claims

- 13 A direct marketer must not represent that it is undertaking market research where the purpose for contacting the customer is direct marketing.

Member Suppliers

- 14 All ADMA members will require suppliers to comply with Code procedures as if the supplier were themselves a direct marketer.

Information at time of offer

- 15 Customers must be provided with all information reasonably necessary for them to make an informed purchase decision.
- 16 The customer must be given clear, unambiguous and easily accessible information of the material terms of the offer, including at least the following:
 - 16.1 the name of the relevant direct marketer and a street address at which they can be contacted - a post office box, newspaper or magazine box number, facsimile or telephone number, or an electronic mail address will not suffice as a street address;
 - 16.2 the total price of the goods or services, including any delivery charge and any other fee or charge to which the customer would be liable under the contract unless otherwise authorised by the customer;
 - 16.3 the delivery arrangements;
 - 16.4 all material restrictions, limitations or conditions to purchase; and
 - 16.5 the period, if any, for which the contract solicitation remains valid.

Information at the time of delivery

- 17 No later than at the time of delivery, or in cases where delivery is to be effected in stages, the time of the first delivery, the customer shall receive at least the following information in writing, in a clear and unambiguous style and in the same language as was used in the contract solicitation:
 - 17.1 the name and contact details, including at least the street address, of the direct marketer where customers can make inquiries or complaints, or can return goods or cancel contracts;
 - 17.2 the payment arrangements, including any credit terms, or terms for payment by instalments, and a total cash price;
 - 17.3 all restrictions, limitations or conditions of purchase;
 - 17.4 any safety or care warnings required by any applicable law to accompany the goods or services and, where necessary, instructions for proper use; and
 - 17.5 refund, cancellation and exchange rights and procedures.

- 18 In the case of services that, by their nature, can be delivered extremely quickly to the customer, the information should be sent to the customer within three days of the services commencing.¹

Unfair conduct

- 19 A direct marketer must not engage in conduct which is unfair or "unconscionable." For example, a customer's poor spoken or written English, or an obvious inability to understand the offer must not be exploited.

Incentives

- 20 The terms and conditions under which incentives, including prizes, gifts, or other rewards are offered must be clearly stated, including:
- the manner of drawing or awarding a gift, prize or reward;
 - whether or not the provision of the gift, prize or reward is conditional on the customer purchasing goods or services from the direct marketer.

Delivery of gifts, prizes or free items

- 21 Gifts, prizes or free items must be made available to the customer in the period of time stated in the offer or, if no period of time is stated, within 30 days of the customer becoming entitled to receive the gift, prize or reward.
- 22 If the gift, prize or reward is conditional on the customer purchasing a good or service, and the direct marketer becomes unable to deliver the good or service, the direct marketer must still provide the customer with the gift, prize or reward.

Contests, lotteries or sweepstakes²

- 23 A direct marketer who intends to conduct a lottery or contest must:
- 23.1 make available, at the point of entry, the rules governing the contest or lottery, including whether the customer's name and address will be retained;
- 23.2 ensure that judging takes place promptly and fairly and is certified by an independent auditor; and

¹ This is to cover services that can be provided almost instantaneously, e.g. certain changes to telephony services, where a charging plan may be changed or implemented while the customer is speaking to the operator. In these circumstances, the seller may provide the detailed written information as soon as possible and in any event within three days.

² The conduct of contests, lotteries or sweepstakes is also governed by separate State and Territory laws.

- 23.3 make available the results of the contest or lottery to participating customers who request them.

Availability of goods or services

- 24 Unless the promotional material specifically warns of limited stocks, the direct marketer must not offer particular goods or services for sale until sufficient stock is available, or reasonably expected to be available, to meet the reasonably foreseeable demand.

Delivery

- 25 If the direct marketer has not specified a period for delivery then the goods or services must be delivered in a reasonable time from receipt of an order, such reasonable period of time not to exceed 30 days.

Delayed delivery

- 26 When an order cannot be delivered:
- within the time specified in the offer; or
 - where no time is specified, within 30 days of receipt of an order, the direct marketer must promptly send to the customer an initial notice acknowledging the order. The notice must:
 - state the date on which the order is expected to be delivered;
 - the reason for the delay; and
 - offer the customer the opportunity to cancel the order and receive a full refund of any money paid.
- 27 If the direct marketer is not able to deliver the goods or services by the date stated in the initial notice, the direct marketer must either:
- advise the customer that it is unable to fulfil the order and refund the customer any money paid; or
 - notify the customer of the new expected delivery date ("the second notice"). This notification must be accompanied by a reply-paid or other cost free response mechanism and include an option to refund any money paid.
- 28 If the direct marketer is not able to deliver the goods or services by the date stated in the second notice, the procedure set out in the above clause 27 shall be repeated until the goods or services are delivered or the transaction has been cancelled and any moneys paid refunded.

Payment

- 29 A direct marketer must not request or accept payment for goods or services if it:
- intends to supply goods or services materially different from the goods or services in respect of which payment is made; or
 - there are reasonable grounds, of which the direct marketer is aware or ought reasonably to be aware, for believing that it will not be able to supply the goods or services within the period specified by it or, if no period has been specified, within a reasonable time, such period of time not to exceed 30 days.

Cancellation and refunds

Cooling-off period of 7 days or more

- 30 Each contract a direct marketer makes with a customer shall provide that the customer has the right to cancel the contract:
- within a period of time that is not less than seven business days (this excludes weekends and public holidays); and
 - at any time before the goods or services are dispatched to the customer.
- 31 The seven business day time period shall begin:
- 31.1 for goods, on the deemed or actual date of receipt of the goods by the customer. The customer will be deemed to have received the goods three business days after the goods were dispatched, unless the customer can prove that they were received on a later date or the direct marketer can prove they were delivered at an earlier date.
 - 31.2 for goods which are not complete or functional until the final instalment is delivered and which are distributed periodically, on receipt of the final instalment;
 - 31.3 for distinct goods distributed periodically, such as magazines, on receipt of the first instalment of goods; or
 - 31.4 for services, on the date the contract to supply the services is made.
- 32 The direct marketer must ensure that the customer's right to cancel a contract during the cooling-off period is specifically mentioned or prominently displayed in any contractual documentation.

When the cooling-off period does not apply

- 33 The cooling off period need not apply to:
- 33.1 contracts for the supply of indivisible services where those services have started to be provided;
 - 33.2 any portion of services which have already been performed under a contract for the supply of divisible services;
 - 33.3 transactions concerning securities and other goods or services whose price is dependent on financial market fluctuations, which cannot be controlled by the direct marketer;
 - 33.4 contracts for made-to-measure goods or clearly personalised goods;
 - 33.5 contracts for goods which can be immediately copied, such as books, magazines, computer software, cassettes, videos and compact discs that are supplied with or without a wrapping or seal, unless the good's immediate wrapping or seal is unbroken;
 - 33.6 contracts for personal health or hygiene goods where any wrappings or seals have been broken or tampered with; and
 - 33.7 contracts for goods which by reason of their nature cannot be returned or are liable to deteriorate rapidly.

Method of cancelling a contract pursuant to rights during a cooling off period

- 34 Customers who are entitled to cancel a contract with a direct marketer by exercising their cancellation rights during a cooling-off period may cancel the contract by:
- in the case of goods, returning the goods in their original condition during the cooling-off period; or
 - in the case of services, advising the direct marketer during the cooling-off period of the cancellation of the contract for the supply of services.
- 35 For the purposes of clause 33, goods will be considered to be in their original condition despite their packaging or swing tags having been removed or tampered with.
- 36 A direct marketer is not responsible for the costs of returning goods under a contract cancelled in accordance with the cooling-off provisions.

Option to cancel a contract for continuing series of goods or services

- 37 A contract for the supply of a continuing series of goods or services must enable either party to cancel by giving reasonable notice.
- 38 When a party to a contract for a continuing series of goods or services cancels the contract, each party must satisfy any obligations outstanding at the time of cancellation.

Payment of refunds

- 39 Where a customer is entitled to a refund, a direct marketer must refund moneys within seven business days of the direct marketer receiving the returned goods or notice of the cancellation of the contract from the customer.
- 40 The direct marketer has a choice whether it makes a refund by way of money or by making a credit adjustment to the customer's credit card where:
- a customer claims a refund as a result of a contract cancelled during the cooling off period, or as a result of goods being defective or not fit for the purpose for which they were intended³; and
 - the customer paid the direct marketer by using that credit card.

Minors

- 41 A direct marketer must have appropriate procedures in place to limit the sale of restricted goods or services to minors.
- 42 For the purpose of clause 41, the definition of 'minor' in any restricting legislation is to apply.

Unordered goods or services

- 43 Customers who have been supplied unordered goods or services shall not have to pay for those goods or services.
- 44 Subject to clause 43, customers who have received unordered goods shall become the owner of the goods:
- 30 days after advising the direct marketer that the goods were not ordered and of an address where the goods can be collected; or

³ The Trade Practices Act implies into all contracts for sale of goods or services various warranties. In relation to goods, these are that the goods are of merchantable quality (ie are not defective) and are fit for any purpose which the consumer has made known prior to purchase. In relation to services, these are that the services will be provided with due care and skill. Breach of these conditions entitle the consumer to cancel the contract and claim a refund.

- 90 days after the receiving the goods, whichever is the sooner, unless the direct marketer takes possession of the goods before this time has expired.
- 45 During the time period referred to in clause 44, the direct marketer may contact the customer to make reasonable arrangements for taking possession of the unordered goods.
- 46 Direct marketers are entitled to take possession of goods in the following circumstances:
- the goods were received by the customer in circumstances where the customer knew, or might reasonably be expected to have known, that the goods were not intended for the customer; or
 - during the time period referred to in clause 44, the customer unreasonably refused to permit the direct marketer to take possession of the goods.

Substituted goods or services

- 47 A direct marketer that cannot supply exactly the same good or service as specified by a consumer may supply a substitute good or service of a similar kind, quality and price provided that the possibility of this occurring has been clearly indicated at the time of offer.
- 48 If a direct marketer supplies substitute goods or services to those ordered they must be of a similar kind, quality and price and the direct marketer must clearly inform the customer of:
- their right to cancel the contract and return the goods or cancel the services; and
 - the time period within which the customer may cancel the contract, which time period shall not be less than the cooling-off period.
- 49 When a contract for a substituted good is cancelled, the direct marketer is responsible for the costs of returning the goods. The direct marketer must promptly reimburse the customer in respect of any reasonable costs incurred by the customer in returning the goods.

Responding to a complaint

- 50 Direct marketers must have in place procedures for dealing with complaints from consumers. Such procedures must comply with the Australian Standard for Complaints Handling AS 4269 available from Standards Australia.

C Fair conduct relevant to telemarketing

Identification information

- 1 At the earliest possible opportunity in an outbound telemarketing call, a direct marketer must ensure that the following information is provided to the customer and repeated if the customer at any time requests:
 - 1.1 the name of the person making the telephone call;
 - 1.2 where a service bureau is making the calls, the name of the organisation on whose behalf the call is being made; and
 - 1.3 the purpose of the telephone call.
- 2 When making an outbound telemarketing call, direct marketers must not block the transmission of the calling line identity to any calling number display or any calling name display of a customer who receives the telephone call.⁴
- 3 A direct marketer who makes telemarketing calls must ensure that its name, address and telephone number is listed in a telephone directory or, if a new listing, its telephone number is available through a directory assistance service.

Information to be provided on request

- 4 A telemarketer must ensure that the following information is provided to customers who request such information:
 - 4.1 the telemarketer's name and contact details, including a telephone number and street address;
 - 4.2 the name of the person who is responsible for handling customer inquiries which the telemarketer receives;
 - 4.3 further details concerning the goods or services being offered; and
 - 4.4 details of the source from which the telemarketer obtained the customer's personal information.

⁴ When the outbound call is made by a service bureau on behalf of another organisation, calling line identity blocking may be used provided that the customer is given a telephone number for the organisation.

- 5 A telemarketer who is not able to provide the information at the time of the request will ensure that the customer is provided with the information in a reasonable period after the request is made.

Guise of research

- 6 Where the purpose of the call is to sell a good or service, telemarketers must not represent that they are undertaking market research.

Acceptable calling conduct

- 7 If it appears that a customer has been interrupted at an inconvenient time by a telephone call, the telemarketer must promptly offer to call the customer back and inquire as to when would be a more convenient time to do so.
- 8 A telemarketer must provide the customer with a clear opportunity to accept or decline the direct marketer's offer.

Permitted calling times

- 9 A direct marketer must ensure that all telephone calls to a customer are made between the hours of 8am and 9pm and are not made on the following public holidays:
- Christmas Day;
 - Good Friday; and
 - Easter Sunday.
- 10 If the customer has previously agreed to receive a telemarketing telephone call from the direct marketer outside of these hours or on these public holidays then the direct marketer may make such a call to that customer.

Line disconnection times

- 11 A telemarketer must ensure that the customer's telephone line is released within five seconds of the customer hanging up or otherwise indicating that he or she requires the telemarketer to release the telephone line.

Calling frequency

- 12 A telemarketer must not contact a customer more than once in any 30 day period for the same or similar campaign without that customer's prior consent.

D Fair conduct relevant to electronic commerce

Equivalent Protection for electronic commerce

- 1 The same level of protection provided by the practices that apply to other methods of commerce should be afforded to customers who participate in electronic commerce.

Essential online information

- 2 Clear, complete and current information about the identity of businesses engaged in electronic commerce and about the goods and/or services they offer, should be provided to customers. Additional information should be provided to address particular aspects of digitised good and services, such as technical requirements or transmission details.

Acceptance

- 3 Acceptance of an offer online should be informed and unambiguously expressed by the customer in a format that allows the parties to maintain a complete and accurate record of the contracts.

Consumer complaints, redress and dispute resolution

- 4 Information about making complaints, obtaining redress and pursuing dispute resolution for electronic commerce should be provided online to customers. Mechanisms and procedures should be developed to facilitate handling complaints, providing redress and pursuing dispute resolution online.

Privacy

- 5 Electronic commerce should be conducted in accordance with the consumer data protection principles outlined in Part E of this Code.

Security and authentication mechanisms

- 6 Internationally interoperable security and authentication mechanisms for electronic commerce should be developed and used.

E Fair conduct relevant to consumer data protection

Collection

- 1 A direct marketer should only collect personal information that is necessary for one or more of its legitimate functions or activities.
- 2 A direct marketer should only collect personal information by lawful and fair means and not in an unreasonably intrusive way.
- 3 At or before the time a direct marketer collects personal information from the subject of the information (or, if that is not practicable, as soon as practicable thereafter), it should take reasonable steps to ensure that the subject of the information is aware of:
 - 3.1 the identity of the organisation and how to contact it;
 - 3.2 the fact that he or she is able to gain access to the information;
 - 3.3 the purposes for which the information is collected;⁵
 - 3.4 to whom (or the types of individuals or organisations to which) it usually discloses information of this kind;
 - 3.5 any law that requires the particular information to be collected; and
 - 3.6 the main consequences (if any) for the individual if all or part of the information is not provided.
- 4 Where information is being collected on a form, a direct marketer's obligations under clause 3 can be satisfied by a statement on the form. This could be introduced, if it does not already appear, when the organisation next reprints its forms. It would not be necessary to destroy existing stocks of forms.
- 5 Where information is collected over the phone, it may not be practicable to cover all the clause 3 matters at the time of collection. People should be informed of them as soon as possible, for example, in any confirmatory documentation.

⁵ The description of the purposes can be kept reasonably general, and if the collection is made for only one purpose, it would often be apparent simply from the title of a form, for example, 'Application for Membership'. Internal purposes that form part of normal business practice - auditing, business planning and so on - need not be mentioned.

- 6 The principles do not require an individual to be repeatedly and specifically told the same things every time they have contact with a direct marketer.
- 7 Where it is reasonable and practicable to do so, a direct marketer should collect personal information directly from the subject of the information.
- 8 Where a direct marketer collects personal information from a third party, it should take reasonable steps to ensure that the subject of the information is or has been made aware of the matters listed under clause 3.⁶

Use and disclosure

- 9 A direct marketer should only use or disclose personal information for a purpose other than the primary purpose of collection (a 'secondary purpose') if:
 - 9.1 (a) the secondary purpose is related to the primary purpose of collection; and
 - (b) the subject of the information would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
 - 9.2 the individual has consented to the use or disclosure.⁷
 - 9.3 (a) the organisation uses the information for the purpose of direct marketing; and
 - (b) it is impracticable for the organisation to seek the individual's consent before using the information; and
 - (c) the organisation gives the individual the express opportunity, at the time of first contact or thereafter upon request, and at

⁶ The provisions of this section are framed to ensure that organisations that use third party data (external lists) establish that the suppliers of that data (list) have complied with the disclosure requirements of clause 3. That is, that consumers have been made aware that their details may be passed on to another party for marketing purposes. This can be accomplished in practice by entering into contractual arrangements or by using the ADMA standard list agreement that incorporates this requirement. At the end of the day the onus is on the list user to ensure compliance before use.

⁷ If the consequences for the individual of the use or disclosure were serious, the organisation would have to be able to demonstrate clearly that the individual could have been expected to understand what was going to happen to the information; in such circumstances it would generally be more appropriate to seek express consent. However, implied consent is acceptable in some circumstances: For example, implied consent could legitimately be inferred from the individual's failure to object to a proposed use or disclosure (that is, a failure to opt out), provided that the option to opt out was clearly and prominently presented and easy to take up.

no cost, to decline to receive any further direct marketing communications;⁸ or

- 9.4 the organisation reasonably believes that the use or disclosure is necessary to prevent or lessen a serious and imminent threat to an individual's life or health; or
- 9.5 the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities; or
- 9.6 the use or disclosure is required or specifically authorised by law; or
- 9.7 the use or disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty or for the protection of the public revenue; or
- 9.8 an intelligence or law enforcement agency asks the organisation to use or disclose the personal information on the basis that the use or disclosure is necessary to safeguard the national security of Australia.

Determining primary purpose of collection:

- 10 When a direct marketer collects personal information from an individual, both parties are usually aware of the purpose of collection, for example: to purchase a product or service, enter a competition, make a donation or obtain a discount. This is the "primary" purpose of collection, even if the organisation has some additional purposes in mind.
- 11 Where the information is not collected from the individual, the organisation usually uses the information soon after collection in a manner associated with the primary purpose of collection. For example, if an insurance company consults an insurance reference service in the course of considering an applicant, it seems clear that the primary purpose of collection is to decide whether or not to insure the individual.

Reasonable expectations test

- 12 A direct marketer should only use or disclose personal information in ways in which a person with no special knowledge of the industry or activity involved would "reasonably expect". For example, a person who subscribes to a magazine

⁸ This allows personal information to be used in order to establish contact with an individual, even if they have not consented and would not reasonably expect the information to be used for this purpose, provided that the individual is given the chance to opt out of any further approaches

could reasonably expect to receive offers from a book club that was affiliated (co-branded) with the magazine. However if, from the customer's perspective, there was no obvious link between the magazine and its affiliated book club, the individual would not reasonably expect their contact details to be passed along for direct marketing purposes without first being given a clear opportunity to opt-out.

- 13 If a direct marketer uses or discloses personal information under clause 9, it should make a note of the use or disclosure.

Data Quality

- 14 A direct marketer should take reasonable steps to make sure that the personal information it collects, uses or discloses is, accurate, complete and up to date.

Data Security

- 15 A direct marketer should take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.
- 16 A direct marketer should take reasonable steps to destroy or permanently suppress personal information if it is no longer needed for any purpose.

Openness

- 17 A direct marketer should have clearly expressed policies on its management of personal information which should be readily available.
- 18 A direct marketer, on request, should take reasonable steps to let individuals know, generally, what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses that information.

Access and correction

- 19 Where a direct marketer holds personal information about an individual, it should provide the individual with access to the information on request, except to the extent that:
- 19.1 providing access would pose a serious and imminent threat to the life or health of any individual; or
 - 19.2 providing access would have an unreasonable impact upon the privacy of other individuals; or
 - 19.3 providing access would be unduly onerous for the organisation; or

- 19.4 the request for access is frivolous or vexatious; or
 - 19.5 providing access would be likely to prejudice an investigation of possible unlawful activity; or
 - 19.6 providing access would be unlawful; or
 - 19.7 denying access is specifically authorised by law; or
 - 19.8 the information relates to existing legal dispute resolution proceedings between the organisation and the individual, and the information would not be accessible by the process of discovery in those proceedings; or
 - 19.9 providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations; or
 - 19.10 an intelligence or law enforcement agency asks the organisation not to provide access on the basis that providing access would be likely to cause damage to the national security of Australia.
- 20 Where providing access would reveal evaluative information generated within the organisation in connection with a commercially sensitive decision-making process, the organisation may give the individual an explanation for the decision rather than direct access to the information.
- 21 If a direct marketer has given an individual an explanation under clause 20, and the individual believes that direct access to the evaluative information is necessary to provide a reasonable explanation of the reasons for the decision, the individual should have access to an independent process to review whether that is so.
- 22 Wherever direct access by the individual is impracticable or inappropriate, the organisation and the individual should consider whether the use of mutually agreed intermediaries would allow sufficient access to meet the needs of both parties.
- 23 If a direct marketer levies charges for providing access to personal information, those charges:
- 23.1 should not be excessive; and
 - 23.2 should not apply to lodging a request for access.
- 24 If a direct marketer holds personal information about an individual and the individual is able to establish that the information is not accurate, complete and up

to date, the organisation should take reasonable steps to correct the information so that it is accurate, complete and up to date.

- 25 If the individual and the organisation disagree about whether the information is accurate, complete and up to date, and the individual asks the organisation to associate with the information a statement claiming that the information is not accurate, complete or up to date, the organisation should take reasonable steps to do so.
- 26 A direct marketer should provide reasons for denial of access or correction.

Identifiers

- 27 A direct marketer should not adopt as its own identifier an identifier that has been assigned by a government agency (or by an agent of, or contractor to, a government agency acting in its capacity as agent or contractor).
- 28 A direct marketer should not use or disclose an identifier assigned to an individual by a government agency (or by an agent of or contractor to a government agency acting in its capacity as agent or contractor) unless one of clauses 9.4 to 9.8 applies.

Anonymity

- 29 Wherever it is lawful and practicable, individuals should have the option of not identifying themselves when entering transactions.

Trans Border Data Flows

- 30 A direct marketer should only transfer personal information outside Australia if:
- 30.1 the organisation reasonably believes that the recipient of the information is subject to a statute, binding scheme or contract which effectively upholds principles for fair information handling that are substantially similar to these principles; or
 - 30.2 the individual concerned consents to the transfer;
 - 30.3 the transfer is necessary for the performance of a contract between the individual concerned and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or
 - 30.4 the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual concerned between the organisation and a third party; or

- 30.5 the transfer is for the benefit of the individual concerned, and
 - (a) it is not practicable to obtain the consent of the subject of the information to that transfer; and
 - (b) if it were practicable to obtain such consent, the subject of the information would be likely to give it; or
- 30.6 the organisation has taken reasonable steps to ensure that the information which it has transferred will not be collected, held, used or disclosed by the recipient of the information inconsistently with these principles.

Sensitive information

- 31 A direct marketer should not collect personal information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or details of health or sex life unless:
 - 31.1 the subject of the information has consented; or
 - 31.2 the collection is required or specifically authorised by law; or
 - 31.3 the collection is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual, where the subject of the information is physically or legally incapable of giving consent; or
 - 31.4 in the course of the legitimate activities of a non-profit-seeking body with a racial, ethnic, political, philosophical, religious or trade-union aim and on condition that the information relates solely to the members of the body or to individuals who have regular contact with it in connection with its purposes and that the information is not disclosed without the consent of the subject of the information; or
 - 31.5 the collection is necessary for the establishment, exercise or defence of a legal claim.
- 32 Clause 31 does not apply where:
 - 32.1 the information is required for the purposes of preventative medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and
 - 32.2 is collected;

- 32.3 as required by law; or
- 32.4 in accordance with rules established by competent bodies dealing with obligations of professional confidentiality

F Enforcement

- 1 The scope of ADMA's enforcement procedures will be limited to alleged breaches of the Code and does not include mediation of consumer complaints that would normally be dealt with by a member's internal complaints handling process.

Complaint received by the ADMA

- 2 Any person who considers that a direct marketer has breached a provision of the Code may lodge a complaint with ADMA, addressed as follows:

Code Compliance Officer
Australian Direct Marketing Association
Level 5
Westfield Towers
100 William Street
Kings Cross
New South Wales 1340

- 3 The complainant should set out the following details:
 - 3.1 his or her name and contact details;
 - 3.2 the name and, if known, the contact details of the direct marketer;
 - 3.3 a brief outline of the complaint; and
 - 3.4 if the complainant has previously made a complaint to the direct marketer, a brief outline of how that complaint was dealt with by the direct marketer.

Responding to complaints related to alleged breach of the Code

No breach of the Code

- 4 If, after assessing a complaint, the Code compliance officer does not consider there has been a breach of the Code, the Code compliance officer shall write to the complainant informing him or her that:
 - based on the information provided by the complainant, there does not appear to be a breach of the Code;
 - if new information becomes available, the complainant may request that ADMA review the complaint again; and

- the response of ADMA does not preclude the complainant from pursuing other forms of redress such as lodging his or her complaint with a government regulatory authority.

Potential breach of Code by non-members

- 5 Where the Code compliance officer considers that a direct marketer who is not a member of ADMA may have breached the Code, the Code compliance officer may write to the non-member informing them of the existence of the Code and request compliance.

Potential breach of the Code by member

- 6 Where the Code compliance officer considers that an ADMA member may have breached the Code, the officer shall write to the ADMA member outlining the particulars of the alleged misconduct and requesting a written response to the allegations within 14 days.
- 7 If within 14 days the ADMA member provides clear evidence of acting in compliance with the Code or independently resolves the complaint, the Code compliance officer will take no further action.
- 8 If the ADMA member disputes the complaint they must show evidence of steps undertaken in the matter to comply with the Code. If the member is not able to demonstrate compliance within a reasonable period of time, the Code compliance officer shall refer the complaint to the Code Authority for its consideration in accordance with clauses 9, 10 and 11.
- 9 Upon reviewing the complaint, the Code Authority may:
- direct the Code compliance officer to investigate the complaint further and report the results of such investigation to the Code Authority;
 - cause the Code compliance officer to send a notice to the ADMA member inviting the direct marketer to attend a hearing regarding the alleged breach of the Code by the direct marketer. The notice should stipulate the place, the day and hour of the hearing and offer the ADMA member the opportunity to attend the hearings by way of telephone conference; or
 - resolve not to further pursue the alleged breach.

Hearing before the Authority

- 10 At the Code Authority hearing, the ADMA member shall be given a reasonable opportunity to present its case. The member may make verbal submissions in relation to the allegations. The ADMA member may appear in person or may be represented by some other person.

- 11 Prior to or at the Code Authority hearing, the ADMA member may make written submissions to the Code Authority. Prior to the Code Authority hearing, the ADMA member must be given a reasonable opportunity to inspect any documents which the Code Authority proposes to have regard to in reaching its decision on the allegations.
- 12 Within 14 days of the conclusion of the Code Authority hearing, the chief executive officer shall send the direct marketer a notice containing the decision of the Code Authority. If the decision affirms the allegations then the notice shall also include any remedial action the Code Authority considers appropriate.
- 13 The member will have 14 days from receipt of the decision of the Code Authority to take the necessary steps to comply with the decision.
- 14 If within 14 days from receipt of the decision of the Code Authority the member is unable to demonstrate compliance with the decision, the CEO will 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.
- 15 If ADMA records indicate that the member has breached the Code on two or more occasions in the preceding twelve months, the Code Authority may recommend to the CEO that ADMA membership be revoked.

G Code review and amendment

Review

- 16 The Code shall be reviewed one year after it has been adopted and thereafter every three years.
- 17 In conducting its review of the Code, the Code Authority should, where appropriate, consult with groups affected by the Code.
- 18 The review shall be presented to the Board.

Amendment

- 19 The Board may at any time resolve to amend the Code after receiving such recommendations from the Code Authority.
- 20 Once an amendment of the Code has been made by the Board, the Board will ensure that:
- each member of ADMA promptly receives notice of the amendment; and
 - the amendment is adequately publicised so that customers and direct marketers who are not members of ADMA may be made aware of the amendment.

APPENDIX 1 - Interpretation and definitions

- 1 References to singular include the plural and vice versa.
- 2 The Code is to be interpreted in accordance with its objectives. It is not to be read literally if that would produce a result clearly contrary to those objectives.
- 3 Unless otherwise indicated, in the Code these words have the following meanings:
 - 3.1 **ADMA** means the Australian Direct Marketing Association Limited (ACN 002 909 800) of suite 1, level 5, 100 William Street, Kings Cross, New South Wales 1340;
 - 3.2 **Board** means the board of directors of ADMA;
 - 3.3 **Code** means the ADMA Code of Practice as amended from time to time in accordance with Part G of the Code;
 - 3.4 **Code Authority** is the Authority established by the ADMA, consisting of persons of good character and repute in the direct marketing industry and including at least one customer representative.
 - 3.5 **direct marketer** means an individual, corporation, partnership or organisation contracting or intending to contract for the sale of goods or services to a customer where:
 - the customer is contacted through a means of distance communication; and
 - customers are invited to respond using a means of distance communication; and
 - it is intended that the goods or services be supplied under a contract negotiated through a means of communicating at a distance; and
 - a record of the transaction is captured and maintained on a list or database for further marketing purposes.An employee, director or agent of a direct marketer shall also be considered a "direct marketer" for the purposes of the Code;
 - 3.6 **fundraiser** means a person, company, partnership or organisation which solicits donations from the public using a means of distance communication;
 - 3.7 **telemarketing telephone call** means a telephone call initiated by a direct marketer or by an automatic dialler mechanism of a direct

marketer that is designed to induce customers to purchase goods or services.