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COMMONWEALTH OF AUSTRALIA
TRADE PRACTICES ACT
AGREEMENTS AFFECTING COMPETITION:
FORMAL APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made for revocation of authorised code *Australian Direct Marketing Association Direct Marketing Code of Practice Authorisation No. A40077 of 16 August 1999* and substitution with the amended code at Attachment A under section 91C:

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

1(a) Name of Applicant

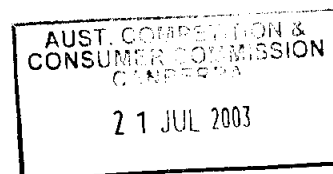
Australian Direct Marketing Association Limited ("ADMA")

(ABN 34 002 909 800)

Suite 1, Level 5

100 William Street

EAST SYDNEY NSW 2011



1(b) Short description of business carried out by the Applicant

ADMA is a non-profit industry body established to represent the collective interests of its members who contact potential and existing customers via various means of distance communication and invite them to respond using one of the means of communication at a distance with the intention of supplying goods and services under a contract negotiated at a distance. Its members comprise sole traders, bodies corporate, partnerships or unincorporated associations which carry on business, practice or engage in direct marketing in Australia and persons employed or otherwise engaged in direct marketing 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 and 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 and 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, promotion, 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.

Ms Jodie Sangster

Manager - Legal and Regulatory Affairs

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

A Code Authority to enforce the ADMA Code of Practice was established in 1999 and has produced annual reports detailing its activities. The Authority has 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 Code of Practice sets out specific standards of conduct for participants in direct marketing 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.

The contract, arrangement or understanding is contained in the amended ADMA Direct Marketing Code of Practice annexed to this application. On the recommendation of the Code Authority, one of the amendments is extension of the Authority's remit to consider disputes between ADMA members as well as between ADMA members and their customers.

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

Each member of ADMA, a list of whom can be supplied on a confidential basis if required.

3 Names and addresses 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 revocation and substitution

The arrangements in the amended 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 public benefits identified in Authorisation No: A40077 were manifest and will continue to 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 at a higher level than the minimum legal requirement;
 - 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 the best possible complaint handling procedures particularly due to the enhancements recommended by the Code Authority incorporated in the amended Code.
- (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 channel 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 independent chairman - currently and into the foreseeable future, the former senior official responsible for consumer affairs for the Commonwealth - and two consumer representatives on the Code Authority, the composition being a condition of Authorisation No.A40077. Member sanctions and some of the proposed amendments to the Code itself have been and will 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

The level of anti-competitive detriment possible under the amended Code subject of this application is less than was the case in the original Application for Authorisation of the ADMA Code because of the introduction into law of the private sector amendments to the Commonwealth Privacy Act 1988 and the Anti-Hawking provisions of the Financial Services Reform Act relating to sale of financial services products over the telephone. Hence the restrictions on the conduct of ADMA members beyond that required by relevant State, Territory and Commonwealth legislation are consequently lessened. In other respects,

however, the Code of Practice is still relatively prescriptive in relation to 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 in addition to statutory rights in some jurisdictions;
- the requirement that telemarketers identify themselves to potential customers;
- limiting the times when telemarketers may telephone potential customers other than calls subject to the Anti-Hawking provisions of the Financial Services Reform Act.

ADMA was established in 1966. The majority of prominent participants in the direct marketing industry are members of ADMA. ADMA currently represents over 500 organisations involved in direct marketing including financial institutions, publishers, catalogue and mail order traders, airline and travel service providers, charities and fundraisers, call centres and telecommunications service providers, printers and advertising agencies, list and data-base specialists, mail house and fulfilment services, internet service providers and electronic and mobile marketing specialist providers.

It is estimated that ADMA members are responsible for approximately 80 per cent of annual sales derived from the use of direct marketing techniques. The accepted measure of the size of the industry is the annual Direct Marketing Survey produced by CEASA (Commercial and Economic Advisory Service of Australia) whose 2002 Report assessed the total spent on direct marketing at \$17.5 billion.

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 applicant contends however 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. Particularly, recent technological advances in electronic and mobile marketing as well as product development and greater access to world markets has meant that the boundaries for such differentiation are limitless.

The applicant contends that the restrictions on the conduct of ADMA members is directed more towards promoting the interests of consumers 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 applicant acknowledges 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 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 any twelve-month period will have been contacted by or will have heard or seen offers by direct marketers. This is increasingly likely as, in the 2001 calendar year for instance, spending on direct marketing increased by 2.5 per cent compared to static or negative growth in traditional media including free-to-air television, radio and print advertising. 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 actual goods prior to entering

into a purchasing 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 still a growing industry although the years of double-digit annual growth appear to be a thing of the past.

Potential customers in the direct marketing industry can be vulnerable and inexperienced in their response to an approach from a direct marketer. The ADMA Code of Practice was a response 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 probably result that the direct marketing industry will be harmed.

The use of sanctions, such as revocation of ADMA membership, is viewed by the applicant 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 is and will be undertaken with a high level of propriety involving fairness and impartiality. The Code Authority will continue to comprise an equal number of consumer and industry representatives and an independent chair. Such representation will continue to ensure that its role is performed with propriety.

ADMA has and proposes to continue to publicise the Code of Practice and the value of compliance throughout the community and among business, an example being a full-page print advertising campaign in national magazines in the 2002-3 year.

Based on the analysis of the detriment and public benefits outlined in this application, the applicant is firmly of the view that the proposed arrangements in the Code of Practice will continue to result in a benefit to the public which will 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. Period for which authorisation is sought

Five years.

6. Why the nominated period is thought to be appropriate

The successful operation of the Code of Practice, the relatively low level of complaints, the ability of the Code of Practice and Code Authority to adapt to a fast changing technological environment and the lack of any demonstrated lessening of competition since Authorisation No: A40077 justify an extended period of authorisation for this application.

REQUEST FOR INTERIM AUTHORISATION UNDER SECTION 91

ADMA makes this request for interim authorisation as it has been impossible to finalise the amended Code of Practice previously in view of developments beyond the applicant's control. It should be stressed, however, that these developments are logistical issues which are unlikely to have any competitive impact.

Under 9.4 of Authorisation No: A40077, authorisation was subject to three conditions to the effect that the Code of Practice be amended to reflect (a) changes to the Model Direct Marketing Code being considered by the Ministerial Council on Consumer Affairs (b) OECD Guidelines for Consumer Protection in the context of Electronic Commerce and (c) Commonwealth privacy legislation.

Conditions (b) and (c) were complied with but it has been impossible to comply with (a). Although repeatedly being made aware by ADMA of the ACCC authorisation deadline, Commonwealth and State consumer affairs have failed to complete the Model Code review in a timely manner. ADMA had hoped to incorporate the provisions of the Model Code in the amended ADMA Code of Practice. As the process of the Model Code review has failed to comply with the provisions of 9.3(m) relating to the conduct of the independent review, ADMA submits that this condition be removed from the interim authorisation, and submits that the circumstances themselves warrant interim authorisation.

The need for the ADMA Code of Practice to be flexible enough to incorporate new technologies is reflected in the incorporation in the amended Code attached of the ADMA Mobile Marketing Code of Practice launched on 19 June. The ADMA Code also needs to take cognisance of the complementary Australian Communications Authority code which will apply to telecommunications carriers. This is also an issue of logistics, not competition, in support of the need for an interim authorisation as these changes have taken place so close to the ACCC authorisation deadline.

7. Name and address of the person authorised by the applicant to provide additional information in relation to these applications

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Dated: July 2003

Signed on behalf of the applicant

Jodie Sangster – Manager, Legal & Regulatory Affairs

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