## Gilbert Jewel

**From:** Grimwade Tim
**Sent:** Friday, 12 September 2003 5:23 PM
**To:** Mayrhofer, Tania; Chenoweth Stephanie; Palisi Paul; Gilbert Jewel
**Subject:** FW: FSCPC submission re ADMA Code

**Importance:** High

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For your attention

-----Original Message-----
From: Chris Connolly [mailto:c.connolly@unsw.edu.au]
Sent: Friday, 12 September 2003 4:04 PM
To: adjudication@accc.gov.au
Cc: Lowe Catriona
Subject: FSCPC submission re ADMA Code
Importance: High

Dear ACCC adjudication team,

I attach the Financial Services Consumer Policy Centre submission regarding the application for renewal of the authorisation of the ADMA Code.

I would appreciate an opportunity to discuss the content of this submission with key staff and/or Commissioners as you see fit.

FSCPC has been the lead consumer organisation in this particular authorisation process and the submission is the result of considerable discussion and input from other privacy and consumer advocates. Unfortunately today's deadline coincided with Privacy Week, so some privacy organisations are not in a position to provide written submissions. I have encouraged them to make contact with you and you may wish to seek verbal input.

No parts of this submission are confidential and I am happy for the submission to be posted on the ACCC web site.

Chris

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## Financial Services Consumer Policy Centre

# Submission to the Australian Competition and Consumer Commission opposing renewal of the authorisation of the Australian Direct Marketing Association's Code of Practice.

**September 2003**

THE UNIVERSITY OF
NEW SOUTH WALES

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# 1. Introduction

The Australian Direct Marketing Association Code of Practice has been consistently opposed by privacy and consumer groups since it was first proposed in 1998. It has since been held up as an example of the failure of self regulation in numerous articles, forums, committees and Parliamentary debates.

The Financial Services Consumer Policy Centre (FSCPC) opposed the ACCC's 1999 decision to authorise the Code, warning that:

— ADMA lacked sufficient market coverage in telemarketing and spam;

— The Code lowered, rather than raised, the standard of consumer protection in direct marketing;

— The Code entrenched privacy intrusive practices in telemarketing and spam which were unacceptable to the public;

— The Code lacked sufficient enforcement, monitoring and review mechanisms; and

— ACCC authorisation would be misconstrued as ACCC 'approval' of the type of business conduct permitted under the Code.

FSCPC stands by these warnings and believes that the last four years have demonstrated their accuracy. This submission elaborates on each of these issues in the sections below.

FSCPC opposes renewal of the authorisation. The Code does have both a real and potential impact on competition, and delivers no tangible benefits to consumers. The Code fails the "net public benefit" test in the Trade Practices Act.

## 2. Competition aspects of the Code

The competition aspects of the code have received little attention and could be the subject of further research by the ACCC. However, available information raises several competition matters:

- Some ADMA members refuse to deal (eg through procurement contracts) with non-ADMA members;
- Some third parties prefer to deal only with ADMA members;
- There are some alleged reputational advantages of belonging to ADMA;
- There are general benefits of belonging to an industry association with a high profile for political lobbying; and
- There are some qualification and training packages and education initiatives linked exclusively to ADMA membership.

Because of these matters, non-membership of ADMA may place a direct marketing company at a commercial disadvantage. Code compliance is a requirement of ADMA membership. There is some evidence that code compliance and membership of ADMA do represent a burden for direct marketers:

- There is some evidence that code compliance has required expenditure on "self-audits" and evaluation[1];
- There is some evidence that code compliance has required upgrading CRM software or call centre / e-commerce hardware[2];
- ADMA membership requires payment of a joining fee ($165) and an annual fee based on revenue ($1,089 - $16,500); and
- Access to ADMA's do not call / do not mail lists (now available for third party access) also attracts fees. These fees are set collectively by the ADMA Board, and a substantial (75%) discount is provided to ADMA members.

We also note that small business does not appear to be well represented in ADMA's membership. This is despite the very large number of small businesses listed in business directories who describe themselves as telemarketers, list brokers and other direct marketing categories.

We note, with some interest, that the National Competition Council has considered this specific question in some detail during its NCP review of the South Australian Fair Trading Act 1987[3] (an Act which is largely mirrored in other States in relation to restrictions on door to door sales). Consider the following extracts from the review:

On the question of potential anti-competitive detriment:

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[1] For example, an article in a telemarketing trade publication noted "Costs that companies have borne in their attempts to become Code-compliant include significant business evaluation costs: such as self-auditing and evaluating systems, business practices and technology. Many Code-compliant call centres have gone as far as investing in more sophisticated databases and data warehouses to protect consumer information more effectively." http://www.telcall.com.au/past/2000/35/00cover.html

[2] ibid

[3] http://www.ocba.sa.gov.au/pdf/fair_trading_Act.pdf

"In addition, the Review Panel is concerned that the fact that some forms of off-premises sales such as telemarketing are not regulated results in an anti-competitive effect, with discrimination against those who conduct off-premises sales by the door-to-door method. Consideration should be given to whether other forms of off-premises sales should also be subject to the same or similar restrictions as door-to-door trading on the basis that the same or similar risks of consumer detriment apply to such sales."

On the question of the risks to consumers of telemarketing:

"The above examples point to continued instances of unsound sales practices by door-to-door tradespersons and the continued relevance of the door-to-door trading provisions. There is, however, concern that traders are circumventing the cooling-off and other rights conferred by the door-to-door trading provisions by the use of telemarketing and other forms of non-contact marketing. These practices, although not conducted in the presence of the consumer, exhibit many of the same concerning features as door-to-door selling, such as taking place other than at the trader's place of business at times when a consumer is unprepared and high pressure sales tactics."

On the question of whether legislation could be replaced by self-regulation (with specific consideration given to the ADMA Code):

"The problems with the ADMA Code are that not all direct marketers are members and therefore bound by the Code. Arguably, the unscrupulous, fly-by-night operators are least likely to be members. Given the nature of door-to-door marketing, it is doubtful that consumers would have an opportunity to make judgments about door-to-traders based on their membership or non-membership of ADMA. Further, it would be open to any door-to-door trader to simply cancel its membership of ADMA in the event of a finding of breach of the Code. In light of this, self-regulation is not considered to be an adequate alternative to the existing regulation of door-to-door trading."

The key points to note from the NCP review are:

— The NCC supported equivalent regulation of door to door marketing and telemarketing (because the type of consumer risk was the same);

— The NCC dismissed the ADMA Code as an ineffective alternative to legislation;

— The NCC therefore supported legislation as the most appropriate mechanism for the regulation of direct marketing;

— The NCC predicted that a major weakness of the ADMA Code was that a member faced with sanctions could simply quit membership of ADMA (this has since been proven correct by experience – see the complaints section below); and

— The NCC highlighted the problem caused by the ADMA Code not covering all direct marketers and also being unlikely to cover unscrupulous direct marketers and fly-by-night operators[4].

Overall, we acknowledge that the real and potential anti-competitive impact of the Code is not large, but it is not so inconsequential that the ACCC should dismiss it lightly. The evidence of some anti-competitive impact combined with the NCC's categorisation of the ADMA Code as an ineffective form of regulation, provide compelling reasons to believe that authorisation of the Code would not meet the net public benefit test.

The remainder of this submission deals with the other part of the 'net public benefit' test – whether there are in fact any benefits from the content of the Code for the Australian community.

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[4] Note: Similar concerns were also raised by the Review Panel in the NCP Review of the ACT Hawkers Act and Collections Act, http://www.treasury.act.gov.au/competition/docs/HC_Report_Final_01.pdf

## 3. ADMA's industry coverage

In 1999 FSCPC and other interested parties argued that ADMA was not an appropriate industry association to provide self regulatory coverage of outbound telemarketing and spam. We noted that ADMA's claim that they covered 80% of the direct marketing industry was an estimate and we asked the ACCC to commission independent research on market share. This request was ignored.

In 2003 we find that ADMA are still claiming that they have 80% market share (not even a 1% movement in 4 years). Again, we have asked the ACCC to search for independent verification of this figure, and again, our request has been ignored.

Public benefit can only be achieved by a Code which covers a significant portion of the industry. In particular, the provisions relating to telemarketing and spam can only deliver a public benefit if ADMA's membership includes a significant portion of the industry which conducts telemarketing and spam campaigns.

There are several reasons for doubting that ADMA has significant coverage in outbound telemarketing and spam:

- ADMA's own estimate of market share has not been explained in detail;
- ADMA's 2003 estimate is exactly the same as their 1999 estimate – highly unlikely;
- There are numerous other industry associations which specifically cover aspects of direct marketing, including telemarketing and spam. These include:
  - Direct Sellers Association of Australia (60 members)[5];
  - Australian Teleservices Association (1,800 members) [6];
  - Market Research Society of Australia (1,900 members)[7];
  - Association of Market Research Organisations (300 Members)[8];
  - Internet Industry Association (300 members) [9]; and
  - Fundraising Institute of Australia (1,000 members)[10].
- Only a small proportion of ADMA's membership list their activities as including telemarketing (less than 10%);
- Robin Whittle's analysis of his own telemarketing calls found that only a tiny proportion came from ADMA members[11];
- Robin Whittle's analysis of the "telemarketing" listing in the Victorian Yellow Pages found that only 5 out of 50 listed companies were ADMA members[12];

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[5] http://www.dsaa.asn.au/Index.htm
[6] http://www.ata.asn.au/about_code_1.htm
[7] http://www.mrsa.com.au/index.cfm
[8] http://www.amro.com.au/
[9] http://www.iia.net.au
[10] http://www.fia.org.au/
[11] See Robin Whittle's current submission to the ACCC for full details
[12] ibid

— Our own brief analysis of the NSW Yellow Pages found that only 12 out of 79 listed "telemarketing" companies were members of ADMA[13];

— NOIE's analysis of spam (which composes a growing proportion of direct marketing approaches received by Australian consumers) indicates that only a tiny proportion comes from Australia; and

— ADMA has admitted on several occasions that its own members are unlikely to account for a significant portion of spam.

If ADMA is allowed to continue to make untested and unverified claims that they cover 80% of the direct marketing industry, FSCPC believes it is reasonable for consumers to provide our own estimate. Our best estimate on available information is that ADMA members would account for less than 10% of outbound telemarketing calls and less than 1% of spam in Australia.

We note also that there may be gaps in ADMA's coverage of the list broking industry. This requires some further research, but Robin Whittle's quick analysis of the problem (contained in his submission) may indicate a further weakness in ADMA's coverage:

> "Although I have not researched it specifically, it is clear that there are a number of major list brokers who are not ADMA members, such as:
>
> Accountable List Brokers Pty Ltd http://www.listbroker.com.au hundreds of lists, including one of over 12 million homes, with phone numbers: "Australian Direct Responders".
>
> Dependable Database Data http://www.australiaondisc.com.au . This company seems to be the second major vendor, after ADMA Member Desktop Marketing (http://www.dtms.com.au), of CD-ROMs of White-Pages entries for outbound telemarketing. Their "Australia on Disc" contains 6.9 million residential listings with extensive sorting facilities, including by location.[14]"

Where self regulation is inappropriate - because the code would simply not cover a significant share of the market - legislation is the appropriate regulatory alternative. This is a well-recognised aspect of consumer protection in Australia which has been accepted by the NSW and Victorian Governments in relation to telemarketing, and by the Commonwealth in relation to spam.

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[13] Simple comparison between the ADMA membership list and the Yellow Pages online (searching for NSW – ALL – telemarketing)

[14] See Robin Whittle's submission for full details.

## 4. Direct marketing – an unpopular product

As FSCPC noted at the time of the initial request for authorisation, some aspects of direct marketing are extremely unpopular with members of the public – particularly door to door sales, telemarketing and spam.

The Industry Taskforce on Self Regulation commissioned consultants to assess direct marketing. They found:

> "Direct marketing techniques pose a much greater threat to personal privacy and data privacy than does advertising since direct marketing techniques can be much more intrusive than advertising. While it is easy to ignore radio and television advertising, it is much more difficult to ignore telemarketing, direct mail or email. In addition, some consumers are much more vulnerable to direct marketing techniques than others and can be coerced into purchasing goods and services they would otherwise not have purchased. For example, poorly educated individuals, migrants and the aged can be targeted by unscrupulous firms using high pressure direct selling techniques."[15]

ADMA's own research in 1992 showed that 70% of consumers found telemarketing unacceptable ***even when it occurred between 8am and 9pm.***

Summary and graphic facsimile versions of the results of the **1992 research for the ADMA (by Quadrant Market Research), which showed that 70% of the 1,204 respondents find telemarketing unacceptable.**

QUIKTRAK OMNIBUS - 8/9TH FEBRUARY - 1992

QUADRANT RESEARCH SERVICES
TABLE 9 Q9 DO YOU, GENERALLY APPROVE OR DISAPPROVE OF RECEIVING TELEPHONE SALES CALLS IF THEY ARE MADE BETWEEN THE HOURS OF 8.00am AND 9.00pm?
BASE: WEIGHTED RESPONDENTS
WEIGHTS: AGE/SEX

| | | CITY | | | | | SEX | | AGE | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | TOTAL | SYDNEY | MELB-OURNE | BRIS-BANE | ADEL-AIDE | PERTH+ | MALE | FEMALE | 18-24 | 25-34 | 35-44 | 45-54 | 55+ |
| RESPONDENTS | 1204 | 300 | 304 | 200 | 200 | 200 | 599 | 605 | 189 | 286 | 269 | 151 | 309 |
| WEIGHTED RESPONDENTS | 1200<br>100% | 431<br>100% | 369<br>100% | 146<br>100% | 128<br>100% | 126<br>100% | 581<br>100% | 619<br>100% | 195<br>100% | 277<br>100% | 241<br>100% | 153<br>100% | 333<br>100% |
| Q9 DO YOU, GENERALLY APPROVE OR DISAPPROVE OF RECEIVING TELEPHONE SALES CALLS IF THEY ARE MADE BETWEEN THE HOURS OF 8.00am AND 9.00pm? | | | | | | | | | | | | | |
| APPROVE | 323<br>27% | 112<br>26% | 117<br>32% | 38<br>26% | 25<br>20% | 31<br>25% | 179<br>31% | 144<br>23% | 76<br>39% | 91<br>33% | 56<br>23% | 39<br>26% | 61<br>18% |
| DISAPPROVE | 846<br>70% | 291<br>68% | 249<br>67% | 108<br>74% | 103<br>80% | 95<br>75% | 391<br>67% | 455<br>73% | 116<br>60% | 175<br>63% | 179<br>74% | 111<br>72% | 264<br>79% |
| DON'T KNOW | 31<br>3% | 28<br>7% | 3<br>1% | 0% | 0% | 0% | 12<br>2% | 20<br>3% | 3<br>1% | 11<br>4% | 7<br>3% | 3<br>2% | 8<br>2% |

This issue was largely ignored by the ACCC in its previous determination. FSCPC urges the ACCC to give due consideration to this issue before authorising conduct which the vast majority of the public finds unacceptable.

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[15] http://www.selfregulation.gov.au/publications/TaskForceOnIndustrySelf-Regulation/ConsultantReport/ch4.rtf

Although no recent survey data is available, we note that since 1992 the number of telemarketing calls has increased, and the costs of silent numbers have increased. We presume that if any survey data was available which showed an improvement in the public perception of telemarketing, the industry would have released such information in support of the request for renewal of authorisation.

In 2001 the Office of the Federal Privacy Commissioner commissioned a survey on "Privacy and the Community" (Roy Morgan Research)[16]. The survey included one short section on direct marketing:

> "91% of respondents thought that businesses should have to ask permission before using people's personal information for marketing purposes. Responses were similarly high across all variables, however there were minor differences in states with Tasmania and NSW having slightly higher percentages who thought business shouldn't have to seek permission for marketing purposes (12% and 11% respectively cf. 7% national average). When asked if they would still prefer businesses to seek their permission before marketing to them if this involved having to complete permission forms, the vast majority (87%) said yes. Hence, having control over the use of their own personal information was highly desirable despite the inconvenience of dealing with extra forms."

In the United States, telemarketing's unpopularity is reflected in the establishment of the Government's national do not call register. More than 45 million US households have registered in the first two months of the program[17]. This represents in excess of 1 in 3 US household phone lines.

We also note that sections of the industry itself acknowledge that direct marketing is unpopular. In a footnote to their market and social research privacy code, the Market and Social Research Association note:

> "There is evidence to suggest that many customers who do not wish to be contacted for direct marketing purposes may be willing to be contacted for genuine confidential market research. Therefore, it is recommended that requests for consent to be contacted for research purposes be made separate from those for direct marketing."[18]

The above discussion has dealt with the unpopularity of telemarketing. Spam (unsolicited commercial email) is so unpopular that is does not require any further elaboration on our part. Proposed Australian legislation will set a much higher standard (opt in) than the ADMA Code. The current ADMA provisions on spam (opt out) will soon be entirely irrelevant.

We note that there appears to be less concern about direct marketing by traditional postal methods. This submission concentrates on telemarketing and spam.

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16 http://privacy.gov.au/publications/rcommunity.html
17 http://www.ftc.gov/opa/2003/09/030902dnc2.htm
18 http://www.mrsa.com.au/

## 5. Telemarketing

Telemarketing represents a substantial privacy intrusion. It can be managed in several ways:

- Limiting hours / days of operation;
- Providing opt out lists;
- Requiring telemarketing to be conducted on an opt in basis (perhaps with exceptions for customers with existing business relationships – similar to the proposed national approach to spam);
- Limiting access to public databases; or
- Making silent numbers free of charge.

In some circumstances a combination of these approaches could be useful.

The ADMA Code is a combination of the first two approaches. FSCPC notes that ADMA has actively campaigned against limiting access to public databases or pursuing 'opt in' regulatory frameworks (even for spam!). We are not aware that ADMA has taken any public position on the issue of the outrageous charges which consumers must pay in order to receive a silent line.

ADMA's position on the provision of a 'do not call' list entrenches an opt out approach, which we oppose. It also has several other weaknesses:

- Consumers must provide extensive personal details to ADMA in order to register and all of these details are passed on to marketing companies accessing the list (in the USA consumers provide personal details to the Federal Trade Commission and only the telephone number is passed on to marketers);
- Consumers see little benefit in listing when ADMA's industry coverage is so low; and
- Consumers do not generally trust industry to regulate itself (hence the popularity of the US Government's do not call service compared to the US Direct Marketing Associations' industry service).

We submit that ADMA's position on 'allowable hours" represents the lowest possible consumer privacy standard for ***all*** attempts in Australia relating to the regulation of telemarketing. FSCPC has conducted extensive research to identify any examples of direct marketing laws or self regulation which have a lower standard than the ADMA Code (see the table below). We can find no such example.

This is quite an outstanding achievement by ADMA considering the poor state of consumer laws and regulations in this area[19]. It underscores the issue of whether the ACCC should authorise a standard which is lower than all the available alternatives.

ADMA allows calls to take place on any day of the week (including Sunday) between 8am and 9pm. Only three public holidays are exempt (Christmas Day, Good Friday, Easter Sunday). We note that in ADMA's submission to the Model Code review they stated: "In relation to days of non-calling ADMA believes that ANZAC Day should be added in view of the attitude to that commemorative day in the Australian community. ADMA recommends retention of existing calling hours and days with the exception of Anzac Day." This concession

[19] Note – FSCPC only included 'real' examples of regulation, guidelines and legislation, not 'virtual' examples such as the model code.

does not appear to form part of their current application for renewal of authorisation of the Code. This almost unrestrained approach to telemarketing is lower than every single one of the following Australian standards:

| | Weekdays | Saturdays | Sundays | Exempt days | Source |
|---|---|---|---|---|---|
| ADMA | 8am to 9pm | 8am to 9pm | 8am to 9pm | CD, ES, GF | Code of Practice |
| MRSA[20] | 9am to 9pm | 9am to 8.30pm | 9am to 8.30pm | Public holidays | Interview Guidelines |
| NSW FTA[21] | 9am to 8pm | 9am to 8pm | 9am to 8pm | - | Legislation |
| ATA[22] | 8am to 9pm | 10am to 9pm | 12pm to 9pm | Public holidays | Code of Practice |
| DSAA (Vic)[23] | 9am to 8pm | 9am to 5pm | Banned | Public holidays | Code of Practice |
| FSRA[24] | 8am to 9pm | 8am to 9pm | Banned | Major public holidays | Legislation |
| Victoria (proposed[25]) | 9am to 8pm | 9am to 5pm | Banned | Public holidays | Legislation |
| FAI[26] | 8am to 8.30pm | 8am to 8.30pm | 8am to 8.30pm | Public holidays | Code of Ethics |

We also note the prohibitions on door to door sales in some jurisdictions (this is relevant because the NCC has advised that telemarketing should be subject to equivalent regulation):

| | | | | | |
|---|---|---|---|---|---|
| Tasmania | 9am to 8pm | 9am to 5pm | Banned | Public holidays | Legislation |
| Victoria | 9am to 8pm | 9am to 5pm | Banned | Public holidays | Legislation |
| South Australia | 9am to 8pm | 9am to 5pm | Banned | Public holidays | Legislation |

[20] Market and social research privacy code, Market and Social Research Association, http://www.mrsa.com.au/
[21] Fair Trading Amendment Act NSW 2003
[22] Australian Teleservices Association, Code of Practice, http://www.ata.asn.au/about_code_1.htm
[23] Direct Selling Association Of Australia, Code of Practice, http://www.dsaa.asn.au/DsaDocs.htm#M11
[24] Guidelines issued by ASIC under the Financial Services Reform Act – note there are also additional restrictions on the types of product which can be sold via telemarketing
[25] Forthcoming amendments to Victorian fair trading legislation. These are expected to be introduced before the end of 2003 and will be at least as restrictive as the recent door to door sale provisions.
[26] Fundraising Institute of Australia, http://www.fia.org.au/

We have not conducted extensive research on the international experience in this field. However, we note that some US states have less generous "allowable hours" for telemarketing (eg Connecticut - Public Act 00-118: An Act Concerning Telephone Solicitation). In Canada, weekday calling hours for telemarketing are restricted to between 9:30am and 8pm. Saturdays are from 10:30am to 5:00pm, and Sundays from 1.00pm to 5:00pm.

The population of NSW (and soon the population of Victoria) will both have greater protection than that offered by the Code and enforceable through legislation. FSCPC asks what possible public benefit can be derived from a Code which has more generous telemarketing hours than any other regulatory instrument?

# 6. Spam

We believe only a short discussion on spam is warranted here. The ridiculous spam provisions in the Code should never have been authorised by the ACCC. ADMA has virtually no coverage of spam, and the accepted best practice around the world is to prohibit spam except to those consumers who have opted in to receive spam (with an appropriate exception for customers with existing business relationships).

Spam combines all of the worst aspects of direct marketing with the following additional negative characteristics:

— Massive scale;

— Predominance of illegal material and scams;

— Costs borne directly by the customer; and

— No effective self help mechanisms or do not mail mechanisms.

The Australian Government is now drafting "opt in" legislation for spam which will make the ADMA Code completely redundant. ADMA were the only industry association to argue against the development of opt-in legislation. We note they have recently made public statements indicating that they now support this approach[27].

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[27] Comments made by ADMA staff during Privacy Week, September 8-12, 2003.

## 7. Complaints and enforcement

FSCPC has submitted that the standards provided under the Code are weak on paper. However, of even greater concern, is the weakness of the Code in practice.

After four years of operation, the ADMA Code Authority is only receiving 30 to 40 complaints each year. No other consumer Code in recent Australian experience has been the subject of fewer complaints or managed to achieve such a low profile with members of the public. It is inconceivable that the public is so happy with direct marketing that they have nothing to complain about. Indeed, there is considerable evidence that direct marketing continues to be the subject of a large number of complaints to other regulatory agencies[28]:

— **Privacy NSW**
A significant proportion of matters dealt with by Privacy NSW relate to direct marketing (3.8% of 2660 calls in 2000-2001, 6% of 2734 phone inquires in 2001-2002, 7% of 235 written complaints closed in 2001-2002, 16% of 76 complaints closed in 2000-2001).

— **Privacy Victoria**
By the end of August 2002 the issue of direct marketing had amounted to 7% of overall enquiries. While on its own, the percentage may not appear high, given that most other enquiries related to questions about the introduction of the Information Privacy Act, health matters or the Federal Privacy Commissioner's jurisdiction, direct marketing enquiries were over represented compared to other areas.

— **Office of the Federal Privacy Commissioner**
Hotline calls related to direct marketing formed 3.53% of all Hotline enquiries for the period 21 December 2001 to 20 October 2002. During this same period OFPC received 530 complaints about alleged breaches of the National Privacy Principles (NPPs) and of these approximately 9% were in regard to direct marketing acts and practices. These included complaints about:

  — marketing to deceased relatives which often causes great distress;
  — marketing to children;
  — use of publicly available sources such as electoral rolls, telephone directories, land title registers, deceased notices in newspapers and so on for marketing purposes;
  — apparent difficulty in getting off marketing lists despite repeated requests to stop;
  — no opt-out provided on direct marketing material;
  — no organisation details on direct marketing material;
  — telephone marketers refusing to provide information about their organisation;
  — alleged inappropriate use of personal information collected by one organisation for direct marketing purposes by another organisation; and
  — spam.

In these circumstances it seems more likely that the low level of complaints under the Code can be explained by other factors:

[28] These statistics are from submissions to the recent review of the Model Code.

- Members of the public are not aware of the Code;
- The majority of direct marketing complaints (most of which relate to telemarketing and spam) concern organisations who are not members of ADMA;
- The Code does not actually prohibit the major type of conduct which aggravates consumers (being called at home during dinner-time or receiving hundreds of spam emails – both of which are permitted under the Code);
- Members of the public do not trust the industry to regulate itself and are looking for more independent regulators;
- Members of the public can see no benefit in making complaints under the Code because no compensation is available; and/or
- Members of the public can see no benefit in making a complaint under the Code because it lacks enforcement (when compared to legislation).

We note that consumer and privacy organisations warned in 1999 that the public was unlikely to embrace self regulation by ADMA or to see any benefits in making a complaint under the Code.

For those few people who have complained under the Code, the experience is also discouraging.

In 2000 the ADMA Code Authority decided to pursue some compliance related sanctions with an ADMA member who had been the subject of complaints under the Code. Faced with an increased interest by the ADMA Code Authority, the company simply quit membership of ADMA:

> "Following a series of complaints against Victor Paul Direct Marketing, the Code Authority sanctioned the Sydney-based company, which specialises in direct response television advertising. Common areas of concern included unsatisfactory handling of complaints, disputed billing practices, and lack of clarity of the initial offer. In the course of deliberations, the Code Authority sought information on what systems and procedural changes or training the company intended to implement to address these issues before considering if any further action was necessary. However, on 3 August 2000, ADMA received notification that Victor Paul, an ADMA member since 1994, would not be renewing its corporate membership.[29]"

It has not rejoined, and no further action against the company has been possible. The ADMA Code Authority simply noted that this case was "unfortunate":

> "I hope Victor Paul reconsiders their decision, as industry recognition of the spirit and principles of the Code is crucial in establishing trust in the practice of direct marketing within our community. The issue of any subsequent sanctions available against non-members is a continuing matter of discussion by the Authority.[30]"

Victor Paul is still in business (and in fact rents out its list of 160,000 customers for other direct marketing campaigns[31]) and no additional discussion, publication or consultation has taken place concerning "the issue of any subsequent sanctions available against non-members".

Many of the privacy and consumer organisations who opposed the 1999 application, predicted that this type of enforcement problem would occur. The NCC also warned that this would happen. This is a poor result for consumers who would otherwise have succeeded with their complaints. Overall, this will result in a situation where those companies most likely to cause consumer detriment are not members of ADMA.

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[29] ADMA Code Authority, 2001 Annual Report, page 9.
[30] Ibid, page 7.
[31] http://www.listbank.com.au/list-info.cfm?li=213

## 8. Monitoring and review

The ACCC authorised the ADMA Code on the understanding that the Code would be the subject of regular monitoring and independent review. The 1999 decision noted the following provisions contained in the original Code:

> "Part G outlines the procedures for reviewing and amending the Code of Practice. Clause 1 provides that the Code of Practice will be reviewed one year after it has been adopted, and every three years thereafter. Clause 2 provides that the Authority, who must consult with groups affected by the Code of Practice where appropriate, will conduct the review. Clause 4 provides that the Board may at any time resolve to amend the Code, after receiving such recommendations from the Authority."[32]

The ACCC also took note of ADMA's promise to include some specific items (such as the question of financial compensation) in their promised "one year" review:

> "It [ADMA] also expressed concern that the establishment of a compensation fund would attract "every kind of charlatan with a real or imagined complaint against direct marketers". ADMA considers that it would be appropriate to raise this matter in the context of the one year review of the Code so that reference could be made to other compensation schemes in other business sectors to ensure complementarity."[33]

In the final determination the ACCC chose to impose an independent review (as opposed to a review conducted by the Code Authority) as a condition of the authorisation:

> "The Code is amended to provide that the Code must be subject to independent review on a regular basis, with the review body (not being the Code Authority) to consist of an independent chair and an equal number of industry and consumer/community representatives."[34]

We note that in the four years since the authorisation no independent review has been conducted. Numerous other ADR schemes and Codes have been reviewed during that period and improvements have resulted from those reviews.

There has been no public discussion of why this condition of the authorisation has been breached. Interested parties, who may have expected two reviews to have been conducted in four years, have not been informed of this breach. As a result, the Code has not been the subject of any outside scrutiny.

We also note that the Code still excludes financial compensation from the list of available sanctions and remedies, and no review has been conducted (as promised) of this important gap.

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[32] ACCC, Final determination, August 1999 at page 8.
[33] Ibid, page 23.
[34] Ibid, page 47

## 9. Conclusion

Beyond the direct adverse impact of the Code on consumer rights in direct marketing (especially outbound telemarketing and spam), the ACCC's authorisation of the Code has a potential wider impact.

The regulation of direct marketing is now being addressed by initiatives which display Government's willingness to take an interventionist approach.

In Australia, the Financial Services Reform Act prohibits door to door sales of financial products completely. It also prohibits the telemarketing of certain classes of financial products (such as shares). Where it does allow the telemarketing of certain products (such as insurance) this concession is backed up by provisions which go well beyond the scope of the ADMA Code:

- Tighter calling hours (eg no calls on Sundays);
- Licensing regime with the ability to ban companies from operating;
- Compulsory insurance;
- A requirement that documentation be provided before the sale can be completed; and
- A requirement that the offer must suit the customer personally.

We note that it is also impossible for a financial service licensee to quit membership of their industry complaints scheme when faced with complaints or sanctions (they would simply lose their licence as a result).

A similar interventionist approach has been taken by State Governments, with the encouragement and support of the National Competition Council. Again, these measures are backed by legislation and real sanctions and enforcement powers.

There is also evidence of a more interventionist approach overseas. The United States Government finally "gave up" on the self regulation of telemarketing and launched its own national do not call list this year (it goes 'live" this month). Consumers in the US have rushed to join the do not call register because they trust the government to administer the scheme (rather than having to provide their personal details to industry) and they can see that the scheme is backed up by heavy fines and a commitment of resources to enforcement action.

In Australia, consumers will benefit if some of the momentum behind these more interventionist approaches leads to better consumer outcomes in legislation at the national and state levels. However, this momentum will be 'checked' if the ACCC renews its authorisation of the ADMA Code.

While the FSCPC and the many consumer and privacy opponents of the Code understand that the "net public benefit test" is a limited test, especially in cases where the anti-competitive detriment may be small, the decision of the ACCC in this matter might have a significant impact on consumers.

The ACCC may not like it, but authorisation is seen by members of the public, and some sections of industry and politics, as a form of "approval" for the behaviour permitted by the Code. Authorisation can lead to a perception that the ACCC endorses spam and telemarketing.

Indeed, in the immediate aftermath of the ACCC's 1999 decision, direct marketing trade publications promoted the notion that the ADMA Code of Conduct had been "approved by the ACCC". Consider the following example:

"ADMA then became the first organisation of its kind in the marketing and advertising field to take the Privacy Principles and actually introduce them in a Code of Practice, which was approved by the Australian Competition and Consumer Commission (ACCC) last September."[35]

Even with the best intentions of all the parties involved, the perception that the Code has been "approved" by the ACCC is difficult to correct.

If the ACCC were to reject the current request for renewal of authorisation, a debate would quickly begin (in many fora), on alternative models of regulation. This would provide an opportunity for Australia to provide true consumer protection in the direct marketing field, including:

- Legislation;
- Free silent numbers;
- A national, Government run, do not call register; and/or
- Opt in approaches for spam and telemarketing.

In conclusion, we believe the ACCC is faced with one key question in making this decision. What possible public benefit can derive from a Code which lowers the standards of consumer protection, has little or no public profile and contains no effective enforcement mechanisms?

[35] http://www.telcall.com.au/past/2000/35/00cover.html