



## Department of Justice

---

**Consumer Affairs Victoria**  
Director

3/452 Flinders Street.  
Melbourne, Victoria 3000  
GPO Box 123A  
Melbourne, Victoria 3001  
Telephone: (03) 9627 6017  
Facsimile: (03) 9627 6040  
Email: [consumer@justice.vic.gov.au](mailto:consumer@justice.vic.gov.au)  
DX210220

Mr Tim Grimwade  
General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

Dear Mr Grimwade

**APPLICATION FOR REVOCATION AND SUBSTITUTION OF AUTHORISATION  
A40077 BY THE AUSTRALIAN DIRECT MARKETING ASSOCIATION (ADMA).**

Thank you for the opportunity to comment on the proposed revocation and substitution of authorisation by the Australian Direct Marketing Association's (ADMA's) Direct Marketing Code of Practice.

Consumer Affairs Victoria (CAV) supports the adoption of self regulatory codes by industry organisations where these codes adopt standards that go over and above minimum legislative standards and provide demonstrable, tangible benefits to consumers.

In analysing the ADMA Code, CAV is concerned that it does not go far enough to protect consumers from intrusive and unfair practices by direct marketers. The Code also fails to establish a regime whereby the conduct of direct marketers is being rigorously monitored to ensure business standards are being adhered to. These issues are discussed in more detail in the attached submission.

As you may be aware, the Victorian Government has recently participated in the national Ministerial Council on Consumer Affairs (MCCA) review of the Direct Marketing Model Code. Based on a desire to support the national process CAV endorsed the recommendations made by the Working Party, however expressed disappointment that the Commonwealth Government, as chair of the Working Party, did not consider more far reaching amendments to raise industry standards and improve consumer protection.

In the absence of a robust national approach and a lack of industry commitment to improving practices in the market, Victoria is focusing on improving the legislative framework to introduce stricter provisions on telemarketing and direct marketing activities. A Reference Panel comprising consumer, retail and legal representatives, including ADMA, has made recommendations to Government and these are currently being considered to introduce cooling off period for telemarketing sales; a threshold amount which sales by telemarketing cannot exceed and restrict telemarketing activities on a Sunday.

Based on the issues raised in the attached submission, CAV does not believe that authorisation should be granted for the revised ADMA Code. However, should you be persuaded that authorisation does have merit, we suggest the ACCC insist upon the Code being revised to include the following:

- objective and clear code rules and examples of acceptable practices;
- effective remedies and sanctions; and
- stronger provisions to deal with the increasing use of email and spam and restrictions on email marketing that go beyond the anti-spam regulations proposed by the Commonwealth;

ADMA should also be asked to address improve administration of its Code, including with a stronger emphasis on enforcement of the Code, monitoring outcomes and improving awareness of the Code among consumers.

Should you have any questions on the content of CAV's submission, the officer responsible for handling this issue is Ms Tanya Swards and can be contacted on (03) 9627 7179 or via email at: [tanya.sewards@justice.vic.gov.au](mailto:tanya.sewards@justice.vic.gov.au)

I trust that you will consider these issues in your deliberations.

Yours sincerely

**DR DAVID COUSINS**  
Director

## CONSUMER AFFAIRS VICTORIA

### APPLICATION OF REVOCATION AND SUBSTITUTION OF AUTHORISATION A40077 BY THE AUSTRALIAN DIRECT MARKETING ASSOCIATION LIMITED (ADMA)

#### SUBMISSION TO THE ACCC

#### **Background**

On 25<sup>th</sup> July, ADMA applied to the Commission for revocation and substitution of its original authorisation for its Code of Practice.

Authorisation is granted by the ACCC in situations whereby a business practice may have some anti-competitive effects, but where the public benefit arising from this conduct would outweigh the public detriment of lesser competition in the market. In general, the ACCC is required to determine whether the provisions of the Code of Practice for which the applicant has sought authorisation are likely to result in a benefit to the public that is sufficient to outweigh any likely anti-competitive detriment resulting from the provisions.

ADMA applied for an interim authorisation for its Code to be granted while the application is being considered by the ACCC. Interim authorisation was granted by the ACCC on Wednesday 13<sup>th</sup> August. This will be reviewed at the draft determination stage, once the matter has been fully considered and submissions received.

On 29 July 2003, the ACCC wrote to the Director of Consumer Affairs Victoria (CAV) seeking submissions on the request for revocation and substitution of authorisation of the ADMA Code.

#### **Key issues**

CAV has considered the revised ADMA Code and is not convinced that the public benefits outweigh the potential detriment to competition. Factors that have been considered include:

- previous authorisation process;
- position of ADMA in the market;
- proposed amendments to the Code;
- technological and legislative developments since the Code has been implemented;
- language and clarity in the Code;
- awareness of the Code among consumers;
- ADMA's enforcement practices;
- monitoring and auditing procedures; and
- the capacity of the Code to raise standards of business practice.

#### ***Previous authorisation process***

Serious concerns were aired in 1999 about the extent to which the Code would offer public benefits. Key issues raised in submissions included the narrow definition of what would be considered direct marketing, the failure to adopt an "opt-in" approach for direct marketing, the failure of the Code to provide monetary compensation for complainants, the lack of independent review processes in place and the failure to take into account the unique nature of direct marketing over the internet.

### ***Position of ADMA in the market***

ADMA claim to have approximately 500 members and represent 80% (\$16.2 billion) of the value of direct marketing turnover in Australia. This will mean that any restrictions, such as implementation of a compulsory Code of Practice will have the potential to standardise the way in which participants in the direct marketing industry conduct their business and engage in trade.

Authorisation of the Code for a further five years may set a de facto standard for direct marketers that would not provide adequate protection for consumers who engage with the industry, and in fact inhibit moves by individual direct marketing enterprises to offer innovative consumer protection initiatives.

### ***Proposed amendments to the Code***

The proposed amendments to the Code, for which ADMA are seeking revocation and substitution of authorisation are extremely minor. It appears that the only amendments are:

- the requirement for additional complaints handling processes to be put into place by members;
- an extension of ADMA's functions to deal with complaints between members and suppliers; and
- an additional provision to prohibit the transferring of personal information to third parties.

Given the significant technological developments that have taken place in recent years, in particular with the proliferation of email and spam, CAV would expect that the Code would have included further amendments to raise the standard of ADMA members and provide greater clarity and guidance as to how members can make responsible use of advances in technology.

### ***Technological and legislative developments***

Since the Code was first developed significant technological developments have impacted on the direct marketing industry. These changes have made it easier for direct marketers to target consumers in ways that can invade their privacy, particularly through the use email and spam.

It seems reasonable at least to expect that ADMA's Code should adopt the provisions that are consistent with the proposed anti-spam regulations that are to be adopted by the Commonwealth Government. This includes banning the sending of commercial electronic messaging without the prior consent of end-users unless there is an existing customer-business relationship (an opt-in regime; banning the distribution and use of e-mail 'harvesting' or list-generating software; and establishing a functional 'unsubscribe' facility to enable people to opt-out immediately. While it is acknowledged that ADMA have gone some ways to introduce an opt-in regime and establish the Do Not Call/Email list, Victoria does not believe these provisions go far enough to protect consumers.

Other issues of concern are the cost burdens places on individuals and businesses that are being targeted by direct marketers. Despite the fact that the Code attempts to deal with this through the compulsory opt-out clauses, the ambiguous language that covers acceptable business practices do not provide practical guidance of what is appropriate and what is not.

The specific issue of how direct marketing lists are compiled, and the use of publicly available material such as electoral rolls to conduct direct marketing is one that has sparked considerable public debate and concern.

### ***Language and clarity of the Code***

The language and terminology used in the Code is vague and provides little guidance to direct marketers and fails to set objective and clear Code rules. By way of example, the Code states that "...consumers must be provided with all information reasonably necessary for them to make an informed purchase decision". Similarly, the Code states that "an organisation.... should not engage in practices that are unlikely to cause unreasonable risk of harm".

As a result, it is significantly open to interpretation, thereby reducing its effectiveness as a means to prescribe higher business standards to members.

#### ***Awareness of the Code among consumers***

There is arguably little awareness of ADMA or its Code among consumers. From an internal review document, ADMA's Code Authority identified that it had only received 49 complaints in 2001/02, most of which were in relation to a "do not mail/call" register. Privacy NSW alone received 164 phone complaints about direct marketing during the same period.

The extent to which the Code is actively promoted and provides a consumers with an avenue of complaint and redress must be questioned.

#### ***ADMA's enforcement of the Code***

Since 1999 there is no record of any sanction or expulsion occurring by ADMA's Code Authority. While this may be argued as a positive reflection on the character of the industry, given the significant opposition towards direct marketing, and the number of complaints recorded against direct marketers to other agencies, including privacy agencies, it must be questioned to what extent ADMA are actively enforcing the Code.

Without appropriate sanctions or financial penalties, the extent to which the industry will take compliance with the Code seriously must be questioned.

#### ***Monitoring and auditing procedures***

CAV is concerned that ADMA has not provided objective data to support its application for authorisation. This raises the more general issue of the extent to which ADMA are independently auditing and monitoring the effectiveness of its Code.

To support an application for authorisation, and identify the extent to which the ADMA Code is successfully achieving its objectives, CAV would be keen to see independent auditing reports undertaken and opinion surveys that could indicate the level of consumer awareness of the ADMA Code and where to lodge complaints against direct marketers.

#### ***Capacity for the Code to raise standards of business practice***

In CAV's opinion, codes of conduct should adopt standards that go above and beyond the requirements of legislation to establish best practice business standards.

The ADMA Code fails to set standards that would raise business practice to match consumer expectations. This is reflected in the high level of complaints received by privacy agencies regarding practices by direct marketing companies, and the submissions to the recent Ministerial Council on Consumer Affairs (MCCA) review of the Direct Marketing Model indicated a high level of dissatisfaction with practices occurring in the direct marketing industry, again relating predominately to privacy issues.

#### **Recommendation/s**

Based on consideration of the above issues it is the opinion of CAV that authorisation of the Code should not be granted.

ADMA's code, both in its current form and with the proposed amendments, fails to establish business standards that could be considered best practice and bring into question the extent to which the public benefits of ADMA's code will outweigh the potentially negative effects of anticompetitive conduct that may arise.