

## **CONSUMER LAW CENTRE VICTORIA**

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

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## **Introduction**

The Consumer Law Centre Victoria (CLCV) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (ACCC) on the application by the Australian Direct Marketing Association Limited (ADMA) for revocation and substitution of the current authorisation of its Code of Practice (the Code) under the *Trade Practices Act 1974* (Cth).

The CLCV is one of Australia's leading consumer organisations, undertaking research, policy development, advocacy and education. The CLCV also operates a large consumer legal practice assisting thousands of low-income consumers each year with free legal advice and representation. The CLCV is currently working on a range of issues that affect the consumer interest, including utilities, banking, telecommunications, payday lending and other forms of exploitative credit, public transport, insurance, regulation of lawyers, fair trading and access to justice.

## **1. Executive Summary**

The CLCV opposes renewal of the authorisation of the Code. The CLCV's opposition is based on our view that the anti-competitive effects of the Code are not outweighed by any public benefit. In our submission, the Code fails to satisfy the public benefit test prescribed under the *Trade Practices Act*.

We consider that the Code offers no public benefit. Firstly, the Code institutionalises behaviour and practices which fall short of minimum consumer protection standards contained in current state and federal legislation. A code of practice that institutionalises conduct of a standard lower than that required by legislation cannot, in our view, possibly offer a public benefit. Secondly, the CLCV submits that the Code lacks effective enforcement mechanisms and therefore represents an inadequate model of self-regulation. Accordingly, as the Code clearly offers no public benefit, the CLCV urges the ACCC to dismiss the application for renewal of the Code's authorisation.

In making this submission, the CLCV supports and endorses arguments made by the Financial Services Consumer Policy Centre (FSCPC) in its submission to the ACCC dated 12 September 2003.

## **2. Net public benefit test**

Pursuant to section 90 of the *Trade Practices Act*, the ACCC must not authorise a code of practice which has an anti-competitive effect, unless it passes the net public benefit test. The net public benefit test requires that the code of practice must result in, or be likely to result in, a benefit to the public which outweighs the detriment brought about by the lessening of competition. If the balance is not met, the ACCC cannot authorise the code.

The CLCV submits that the ADMA Code will lead to a lessening of competition within the direct marketing industry. At page 2 of the FSCPC submission, it is noted that available evidence shows that the ADMA Code has already had a number of anti-competitive effects. These effects include instances of some ADMA members refusing to deal with non-ADMA members, and some third parties preferring to deal only with ADMA members. As a consequence, the FSCPC submission concludes that non-membership of ADMA 'may place a direct marketing company at a commercial disadvantage'.<sup>1</sup>

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<sup>1</sup> FSCPC submission, p.2.

Against the detriment created by its anti-competitive effect, we consider that the Code provides no benefit to Australian consumers. In particular, the Code provides for lesser standards of consumer protection with regard to telemarketing than allowed for currently in state and federal legislation. Further, consumers will not benefit from a Code containing clearly inadequate sanctions and a lack of effective enforcement mechanisms. In our view, the Code fails the net public benefit test set out in section 90.

### **3. Telemarketing**

As the FSCPC submission makes clear, in the area of telemarketing the Code institutionalises conduct of a standard lower than that required by legislation. At page 9 of the FSCPC submission, the conclusion reached is that the Code's 'almost unrestrained approach to telemarketing ... is lower than every single one' of the standards set by other codes of practice and legislation, including proposed Victorian legislation.<sup>2</sup>

To support this conclusion, the table set out at page 9 of the FSCPC submission compares the 'allowable hours' for telemarketing provided by the Code with other codes of practice and legislation in Australia. The table makes it clear that the 'allowable hours' in the ADMA Code are the least restrictive of all comparable documents. We support the FSCPC's view that the Code represents 'the lowest possible consumer privacy standard for *all* attempts in Australia relating to the regulation of telemarketing'.<sup>3</sup>

In Victoria, recent amendments to the *Fair Trading Act 1999* (which have been passed but not yet proclaimed) restrict the hours of door-to-door sales to weekdays between 9.00am and 8.00pm and on Saturdays between 9.00am and 5.00pm. We understand that the Victorian Government proposes to introduce further amendments to the *Fair Trading Act* this year, which will deal with telemarketing. It is expected that the hours set for telemarketing will be at least as restrictive as the door-to-door sales provisions.

Critically, after the enactment of the proposed changes to the Victorian legislation, if a telemarketing call is made outside of the stipulated hours, the telemarketer will be in breach of the legislation. The Code provides that a call could be made outside of the hours stipulated in the Victorian legislation, thereby effectively leading to a situation where an ADMA member could be complying with the Code, while simultaneously breaching legislation.

### **4. Lack of effective enforcement mechanisms**

Finally, the CLCV opposes renewal of authorisation due to a lack of effective enforcement with respect to breaches of the Code.

A review of the South Australian *Fair Trading Act 1987*, undertaken by the South Australian Office of Consumer and Business Affairs in accordance with the Competition Principles Agreement, considered the viability of less restrictive alternatives to retaining the door-to-door sales provisions under the legislation.<sup>4</sup> One of the alternatives identified was industry self-regulation. In considering the viability of this option, the ADMA Code was assessed as an example of a self-regulatory model using a code of conduct.<sup>5</sup>

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<sup>2</sup> Proposed amendments to the Victorian *Fair Trading Act 1999*, are to regulate, amongst other aspects of the telemarketing industry, the hours in which it can be conducted.

<sup>3</sup> FSCPC submission, p.8.

<sup>4</sup> Office of Consumer and Business Affairs, South Australia, *National Competition Policy Review Fair Trading Act 1987 Report*.

<sup>5</sup> *National Competition Policy Review Fair Trading Act 1987 Report*, - ref 4 above, p.10.

On the basis of its assessment of the ADMA Code, the review concluded that ‘self-regulation is not considered to be an adequate alternative to the existing regulation of door-to-door trading’.<sup>6</sup> One of the main problems identified in the review with respect to the ADMA Code was the inability to enforce the standards set out in the Code. This inability was attributed to the Code’s industry reach (the fact that not all direct marketers are bound by the Code and arguably, the most unscrupulous are unlikely to be members) and the fact that it would be open to a member to simply quit membership of ADMA in the event of a finding of a breach.

As the FSCPC submission notes, the inadequacy of the Code’s enforcement mechanisms has been demonstrated by a member quitting AMDA in 2000 when faced with the possibility of compliance related sanctions being implemented against it.<sup>7</sup> The act of quitting rendered further action for non-compliance against the company impossible as sanctions are not available against non-members. The company was Victor Paul Direct Marketing and the complaints included ‘unsatisfactory handling of complaints, disputed billing practices, and lack of clarity of the initial offer’.<sup>8</sup> The FSCPC submission points out that ‘Victor Paul is still in business (and in fact rents out its list of 160,000 customers for other direct marketing campaigns)’.<sup>9</sup>

## **5. Conclusion**

Due to its inadequate sanctions and enforcement mechanisms and its institutionalisation of conduct which falls short of minimum standards set out in state and federal legislation, the Code represents an extremely weak example of industry self-regulation – certainly not a Code that seeks to go beyond legislative standards and create public benefit.

In light of its serious inadequacies, the Code offers no public benefit to outweigh the detrimental impact that will flow from its anti-competitive effects. We therefore urge the ACCC to dismiss ADMA’s application for renewal of the Code.

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<sup>6</sup> *National Competition Policy Review Fair Trading Act 1987 Report* - ref 4 above, p.10.

<sup>7</sup> FSCPC submission, p.13.

<sup>8</sup> FSCPC submission, p. 13, citing the ADMA Code Authority, 2001 Annual Report, p.9.

<sup>9</sup> FSCPC submission, p. 13.