

Submission by
Australian Consumers' Association
to
Australian Competition and Consumer Commission
Opposing revocation and substitution of Authorisation A40077¹ for
the
Australian Direct Marketing Association's Code of Practice²

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organisation established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its magazines, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

The ACA opposes renewal of the ACCC authorisation of the Australian Direct Marketing Association's (ADMA) Code of Practice. We do so because we do not deem the Code worthy of authorisation. We take this view on two grounds:

1. The Code is ineffectual and lightly enforced. The Code administered by ADMA and applicable to its' members only achieves limited industry coverage. Therefore the anti-competitive strength of the Code is weak and insufficient to require authorisation.
2. The Code embodies active consumer detriment, so to the degree that the Authorisation is deemed necessary, it fails to deliver public benefit sufficient to justify Authorisation.

We support the level of disaffection and frustration with the origin and administration of the currently registered code expressed by other consumer and privacy advocates.

- We are concerned that the Code is poorly promoted.
- We are concerned that the Code has been weakly and seldom enforced.
- The Code fails to apply the standards that have been forced on the direct marketing industry in emerging electronic media to established forms of communication. The 'opt-in' consent based approach should be required for all forms of direct marketing. At the very least if there is a rationale to apply 'opt-in' to electronic forms, it must be recognized that the telephone is an interactive electronic device, and the same standards for email and mobile should apply.
- The Code regime is vulnerable to the disengagement of parties when even mild sanctions are proposed. This compounds the problem of limited industry coverage noted above. There is obviously not a hugely compelling necessity to subscribe to the Code and not a particularly threatening consequence to un-subscribing.
- Better practice codes have been developed and delivered by other bodies (Internet Industry Association, Australian Communications Industry Forum,

¹ ACCC Ref C2003/938

² ACA File Reference 040710/01; 26 February 2004

the E-Commerce Model Code). While the amendments tabled for the Code scramble to keep up, it is obvious that ADMA has not set the pace. The ADMA Code has been the lowest common denominator, and this remains its aspiration. It seems likely it will continue to be further overtaken by actual and proposed State and Federal legislation.

We think it is important that the ACCC have regard to the unintended endorsement effect that flows from authorisation of the Code. In the minds of consumers unversed in the finer points of regulatory lore and nuance, the phrase 'Authorised by the ACCC' carries the connotation of approval or badging by the ACCC – something that remains under active consideration by Commission. Irrespective of the merits of that notion, consumers would be forgiven for thinking the **consumer** protection agency is lending its imprimatur to the operation of the code and not just indicating an assent to derogation from competition principles.

In our view the Code is essentially trivial. It does not have the strength, has not achieved the coverage and is not administered with sufficient vigour to contribute to any appreciable lessening of competition. It has embodied a 'standard' of behaviour that has fallen behind industry, consumer and legislative benchmarks. We see nothing to reassure us that this will not happen again behind the fig leaf of ACCC approval. In our view the Code cannot be seen to deliver a public benefit, and we have not seen a sustainable argument that it does. The ACCC should not authorise and register pointless, powerless and useless instruments that do not limit competition and or deliver consumer benefit. To do so risks causing poor consumer outcomes and diminishing the standing of the ACCC.