



Australian Competition & Consumer Commission
Ref: C2003/938
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3 February 2004

Dear

Australian Direct Marketing Association Limited Application for Revocation and Substitution of Authorisation A40077

I refer to the Commission's letter to you dated 17 October 2003, advising that the Australian Direct Marketing Association (ADMA) had requested that the Australian Competition and Consumer Commission (the Commission) suspend its consideration of the above application in order for it to address some of the issues raised by responding parties during the re-authorisation process and to implement changes reflected in the revised Model Code of Practice for Direct Marketing.

The authorisation process

By way of background, the Commission is the Commonwealth agency responsible for administering the *Trade Practices Act* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, recognises that competition may not always be in the public interest. It therefore allows the Commission to grant immunity from the Act for anti-competitive conduct in certain circumstances.

One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Additionally under the Act, the Commission may grant an application revoking an existing authorisation and granting a substitute authorisation where the public benefit from the conduct proposed to be authorised (that is, under the substitute authorisation) outweighs the anti-competitive detriment.

In order for the Commission to grant an application to revoke an existing authorisation and grant a substitute authorisation, the Commission must consider the substitute authorisation in the same manner as the standard authorisation process. This process involves informing



interested parties about the application for revocation and substitution and inviting submissions in response to it. The Commission then prepares a draft determination and invites further submissions. A conference may also be called to discuss the draft. The Commission then issues a final determination.

Background

On 25 July 2003, the Commission received an application for revocation and substitution of authorisation A40077 from ADMA. Authorisation A40077 was originally granted by the Commission for ADMA's Direct Marketing Code of Practice on 16 August 1999 for a period of five years (until 16 August 2003).

On 25 July 2003, ADMA applied for revocation of A40077 and substitution to extend the period of the existing authorisation in relation to the current Code of Practice and, on amendments being approved by the ADMA Board of Directors, to substitute the current Code of Practice with an amended Code of Practice.

As previously advised, ADMA was granted interim authorisation on 13 August 2003 for its original Code of Practice. The effect of granting interim authorisation was to protect the original Code from legal action under the Act while the Commission considers and evaluates the merits of the application for revocation and substitution of the Code.

The revised Code of Practice

On 30 January 2004, ADMA submitted a revised Direct Marketing Code of Practice (the revised Code) for consideration by the Commission in its assessment of ADMA's application for revocation and substitution. The revised Code is enclosed for your information. A full copy of the revised Code will be available on the Commission's website: www.accc.gov.au.

Broadly, in its application for revocation and substitution of A40077, ADMA is seeking to replace the current Direct Marketing Code of Practice with the revised Code.

To assist the Commission in considering ADMA's application for revocation and substitution, you are invited to make a submission to the Commission regarding the likely public benefits and effects on competition of the revised Code.

Lodging submissions

Submissions to the Commission should be in writing. Unless confidentiality is requested, they will be publicly available and placed on the public register for that purpose. If you wish to include information in a submission which is of a confidential nature, it should be clearly marked as such and a claim for confidentiality for the material should also be submitted. You will be informed of the outcome of that claim and, if it is refused, the relevant material will be returned to you if you wish. Material for which confidentiality is granted will not be publicly available, but may be taken into account by the Commission in considering whether to allow the previously granted authorisation to cover the revised Code. Guidelines for seeking confidentiality are attached.

If you wish to lodge a submission, would you please address it to:

General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Alternatively, submissions may be faxed to 02 6243 1211 or emailed to adjudication@acc.gov.au

We request that submissions reach the Commission by cob **Friday 27 February 2004**.

Should you have any queries or if you wish to discuss any aspect of this application further, please contact Tania Mayrhofer on (02) 6243 1070.

Thank you for your input and interest in this matter.

Yours sincerely

Gavin Jones
A/g Director
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

Authorisations

The process whereby the Commission assesses applications for authorisation is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation applications.

Applicants and interested parties can request that a submission, or a part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or processes;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

The Commission also has the discretion, under s 89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words “**Restriction of Publication Claimed**” should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words “**Restriction of Publication of Part Claimed**” should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.

Last Updated: 12 December 2002

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