



Department of Justice

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23 FEB 2004

Mr Gavin Jones
Acting Director
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Mr ^{Gavin}Jones

AUSTRALIAN DIRECT MARKETING ASSOCIATION LIMITED APPLICATION FOR REVOCATION AND SUBSTITUTION OF AUTHORISATION A40077

I refer to your letter of 3 February 2004 inviting submissions on the proposed revocation and substitution of authorisation by the Australian Direct Marketing Association's (ADMA's) Code of Practice.

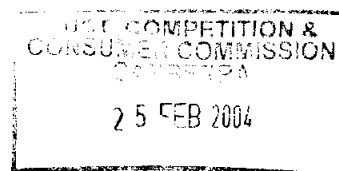
As you will be aware, Consumer Affairs Victoria (CAV) made a previous submission on this matter - see my letter of 18 September 2003.

Having reviewed the latest draft of the ADMA Code, I am pleased to see the additions, particularly clauses dealing with email marketing, m-commerce and the sending of marketing material to minors.

I note that there is now greater clarity in the Code in areas such as removing consumer names from mailing lists.

However, the Code is still very much based on duplicating legislative requirements. In my view and as previously indicated, we consider that the Code should aim at best practice rather than reflecting already mandatory requirements.

While the Code carefully reiterates many mandatory requirements, for example as imposed by the *Privacy Act 1988*, I would point out that there is no reference at all to the requirements relating to unfair terms in consumer contracts contained in part 2B of the *Fair Trading Act 1999*. I acknowledge that the Code has been developed as a national measure but ADMA must ensure that signatories operating in Victoria do not include contractual limitations or conditions in consumer contracts which may be considered as unfair - see Code clauses under Information at the Time of Offer and Information at the Time of Delivery. I note that clause 27 does talk about "unfair or



unconscionable" conduct, however, that provision relates primarily to exploiting a consumer's individual disadvantage.

Notwithstanding the improvements that have been made to the Code, some of the matters raised in our earlier submission are still relevant, for example:

- Awareness of the Code among consumers
- ADMA's enforcement of the Code
Further to our previous comments about ADMA's enforcement activities, I note that clause 9 of the Code enables State and Federal regulatory authorities to refer Code breaches to the Code Authority for consideration. Where there are serious breaches of the Code, which are also breaches of the Trade Practices Act or State and Territory fair trading legislation, or any other legislation for that matter, these breaches should be referred to the appropriate regulator for action. Clause 201.2 as currently drafted will not achieve this outcome.
- ADMA's enforcement of the Code.

In conclusion, CAV notes and acknowledges that improvements have been made to the Code in areas like email marketing. However, we consider that ADMA has lost an opportunity to achieve best practice in direct marketing - it seems the Code is in "catch-up" mode to regulation and we do not think this ought be the primary purpose of the Code. We would reiterate our concerns relating to monitoring and enforcement and promotion of the Code among consumers. Last but not least, the Code should make reference to unfair contract terms in relation to consumer contracts.

Should you wish to discuss this matter, the contact officer is Ms Anne Cousins, telephone (03) 9627 6089 or via email at Anne.Cousins@justice.vic.gov.au

I trust you will consider these issues in your deliberations.

Yours sincerely



Dr David Cousins
Director