



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

## Application for Revocation of A40077 and its Substitution by A90876

lodged by

**The Australian Direct Marketing Association Limited**

*in relation to the Direct Marketing Code of Practice*

**Date: 12 October 2005**

**Commissioners:**

Samuel  
Sylvan  
King  
Martin  
McNeill  
Smith  
Willett

**Authorisation no.** A90876  
**Public register no.** C2003/939

# **Executive Summary**

## **The application**

On 25 July 2003, the Australian Direct Marketing Association Limited (ADMA) submitted an application to the ACCC for revocation and substitution of authorisation A40077 and interim authorisation in relation to its Code of Practice. This document is the ACCC draft determination in which it proposes to grant authorisation to the 2005 ADMA Code for 3 years.

## **The authorisation process**

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA, however, allows the Australian Competition and Consumer Commission (ACCC) to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

Additionally under the TPA, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation when the benefit from the conduct proposed to be authorised (that is, under the substitute authorisation) outweighs the detriment.

Before the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation, it conducts the same public consultation process as it would conduct for a new application for authorisation.

## **The proposed arrangements**

In its application, ADMA sought authorisation to continue to enforce the ADMA Direct Marketing Code of Practice (the 1999 Code), the subject of authorisation A40077, for a further five years.

On 30 January 2004, ADMA submitted a revised Code (the 2004 Code) for consideration by the ACCC in its assessment of a substitute authorisation.

After lengthy consideration of submissions made by interested parties, in May 2005 ADMA requested that the ACCC consider further (draft) amendments to its application for substitute authorisation, being the 2005 revised Code. The 2005 Code was considered and approved by the ADMA Board in August 2005 and was provided to the ACCC for its

consideration on 16 September 2005. This draft determination is in relation to the 2005 Code.

It is understood that the amendments introduced in 2005 are intended to address aspects of concerns raised by interested parties in respect of the 2004 Code. As part of this draft determination the ACCC is seeking the views of interested parties in respect of these amendments.

The ADMA Code is a self-regulatory code governing all aspects of direct and data-driven marketing. The Code sets out specific standards for conduct for participants in direct marketing in relation to their customers and the public. All members of ADMA and their employees, agents or sub-contractors are bound by the Code.

### **Assessment of public benefit and anti-competitive detriment**

In assessing the public benefits and the anti-competitive detriment resulting from the Code, the ACCC must consider the benefits and detriments of the ADMA arrangement against what it considers to be the most likely situation absent of authorisation. In the circumstances presented, the ACCC considers that, in the absence of authorisation, ADMA is likely to revise its Code to reduce possible legal risk.

In considering the possible detriments to the public that may result from the lessening of competition, the ACCC notes the following:

- the loss of/or inability to obtain ADMA membership is unlikely to significantly impede a direct marketers' ability to enter the market or to compete within the industry;
- the level of anti-competitive detriment likely to flow from the existence and enforcement of the ADMA Code is significantly lessened due to the current legislative obligations which exist regardless of the Code; and
- it is not likely that burdens placed on organisations to comply with the ADMA Code would result in any significant anti-competitive detriment.

Overall, the ACCC considers that detriments to competition resulting from the ADMA Code are likely to be minimal.

As a general principle, the ACCC considers that an industry code responding to and appropriately addressing concerns about direct marketing has the potential to result in significant benefits to the public.

However as is evident from interested parties submissions, there is wide spread concern that the ADMA Code does not go far enough in protecting consumers and could be more strongly enforced. While ADMA has made a number of key improvements to the Code, the ACCC nonetheless agrees with interested parties that further improvements in a number of key areas would improve the effectiveness of the ADMA Code and would be likely to result in greater benefits to the public than currently arise.

In considering applications for authorisation, the ACCC's role is to assess whether the public benefits arising from proposed arrangements outweigh the public detriments. It is not the ACCC's role, and it is not so empowered, to improve proposals or to ensure best practice where there is an absence of public detriment flowing from the proposed arrangements.

Overall, the ACCC considers that the ADMA Code continues to provide consumers with some rights and avenues additional to those that are granted at law and continues to provide consumers with recourse to a resolution mechanism where they have complaints regarding the conduct of an ADMA member.

On balance, the ACCC considers that the ADMA Code is likely to result in some, albeit reduced, benefits to the public. As has been noted above, the ACCC considers that the corresponding detriments to competition resulting from the ADMA Code are likely to be minimal.

### **Draft determination**

The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant the revocation of A40077 and its substitution by A90876 for a period of three years.

<b>Executive Summary.....</b>	<b>i</b>
<b>Introduction .....</b>	<b>1</b>
Authorisations .....	1
The current application.....	3
<b>Background .....</b>	<b>5</b>
Direct marketing .....	5
The Australian Direct Marketing Association (ADMA).....	8
The ADMA Code of Practice .....	8
The ADMA Code Authority.....	9
The Ministerial Council on Consumer Affairs Model Direct Marketing Code of Practice .....	11
Commonwealth, State and Territory legislation.....	13
Privacy legislation .....	13
Telemarketing hours.....	15
Spam Act .....	15
Australian eMarketing Code of Practice .....	16
<b>Authorisation A40077.....</b>	<b>18</b>
Independent reviews of the 1998 Code .....	19
<b>Application for revocation and substitution – the 2005 Code of Practice and supporting submission.....</b>	<b>20</b>
Overview of the ADMA Code of Practice .....	20
ADMA submissions in support of application .....	23
<b>ACCC assessment .....</b>	<b>28</b>
Introduction .....	28
The relevant markets .....	29
The counterfactual.....	29
Effect of the ADMA Code on competition .....	31
Conclusion on likely effect of the ADMA Code on competition.....	36
Benefits to the public resulting from the ADMA Code .....	36
Conclusion on public benefits likely to result from the ADMA Code.....	44
<b>Balance of public benefits and anti-competitive detriment.....</b>	<b>46</b>
<b>Authorisation period .....</b>	<b>48</b>

## **Draft Determination – application for revocation & substitution**

The Application .....	49
The Statutory Test .....	49
Conduct authorised.....	49
Time limit.....	50
Interim authorisation .....	50

### **Attachment 1**

ADMA Direct Marketing Code of Practice, September 2005

### **Attachment 2**

Submissions received from interested parties prior to 2004 Code amendments

### **Attachment 3**

Submissions received from interested parties following the 2004 Code amendments

### **Attachment 4**

Submission from ADMA responding to interested parties

# Introduction

## Authorisations

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA 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.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

### *Authorisation - process*

- 1.3. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.4. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5. The ACCC then issues a written draft determination proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.6. This document is a draft determination in relation to an application for revocation and substitution lodged with the ACCC by the Australian Direct Marketing Association Limited (ADMA).
- 1.7. Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.8. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final written determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation

where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

*Authorisation – test for revocation of authorisation and replacement by substitute authorisation*

- 1.9 Under section 91C of the TPA, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party. The ACCC may also initiate an application for revocation and substitution in certain circumstances.
- 1.10 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined at paragraphs 1.3 – 1.7 above).
- 1.11 Under section 91C(7) of the TPA, the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 1.12 In respect of the ADMA arrangements, the relevant test is set out under section 90(6) of the TPA, which provides that the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
  - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 1.13 The ACCC also has the power to grant interim authorisation, at the time the application is lodged, or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the ACCC considers and evaluates the merits of the application.



## **The current application**

- 1.14 On 16 August 1999, the ACCC issued a final determination granting authorisation A40077. Authorisation A40077 is described at Chapter 3 to this draft determination.
- 1.15 On 25 July 2003, ADMA submitted an application to the ACCC for revocation of authorisation A40077 and its substitution by replacement authorisation A90876. As noted below, application A90876 has experienced prolonged periods of delay to accommodate amendments to the ADMA Code(s) and to allow ADMA to respond to submissions of interested parties.
- 1.16 The subject matter of application A90876 was in the same terms as the Code authorised by the ACCC in 1999 (the 1999 Code). The 1999 Code (and consequently, application for substitute authorisation) was subsequently amended in 2004 and again in 2005.
- 1.17 The 2005 Code the subject matter of application A90876 is broadly described at Chapter 4 to this draft determination as was provided to ACCC on 16 September 2005. A summary of ADMA's submission in support of its application for revocation of authorisation A40077 and its substitution by replacement authorisation is also provided at Chapter 4. A complete copy of the ADMA 2005 Code is provided at Attachment 1 to this draft determination. Full copies of the ADMA's supporting submissions are available from the ACCC's public register.
- 1.18 In its July 2003 application ADMA also requested that the ACCC grant interim authorisation to the (then) substitute arrangements. Interim authorisation, if granted, would suspend A40077 and grant immunity to the (mirror) substitute arrangements while the ACCC considered the substantive application. This had the effect of extending the immunity granted to the ADMA arrangements by the ACCC in 1999 while the revocation and substitution process was conducted.
- 1.19 On 13 August 2003, the ACCC agreed to suspend the operation of authorisation A40077 and to grant interim authorisation to the substitute arrangements (the then current Code of Practice). This interim authorisation remains in place. ADMA has not requested that the ACCC amend its immunity to cover the 2004 or 2005 Codes.
- 1.20 On 29 July 2003, the ACCC wrote to a range of interested parties seeking their views on the (then) application, being the 1999 Code. Fifteen submissions were received and are summarised at Attachment 2 to this draft determination. Full copies of non-confidential submissions are available from the ACCC's public register.
- 1.21 On 8 October 2003, ADMA requested that the ACCC suspend its consideration of the application for revocation and substitution to allow ADMA to address issues raised by interested parties in the consultation process and incorporate changes to the Ministerial Council on Consumer Affairs Model Code of Practice for Direct Marketing (MCCA Model Code).

- 1.22 On 30 January 2004, ADMA submitted a revised Code of Practice for consideration by the ACCC in its assessment of a substitute authorisation (referred to as the 2004 Code in this draft determination).
- 1.23 On 3 February 2004, the ACCC wrote to a range of interested parties seeking their views on likely public benefits and anti-competitive detriments flowing from the 2004 Code. Eleven submissions were received and are summarised at Attachment 3 to this draft determination. Full copies of non-confidential submissions are available from the ACCC's public register.
- 1.24 Following the completion of the 2004 consultation process, the ACCC invited ADMA to respond to the submissions of interested parties. This response was provided by ADMA on 4 May 2005 (summarised at Chapter 4 of this draft determination).
- 1.25 At this time ADMA indicated that it was considering further amending its revised Code. On 29 June 2005 ADMA provided, on a confidential basis, a draft of the proposed 2005 Code for the ACCC's information.
- 1.26 On 16 September 2005 ADMA formally provided the 2005 Code to the ACCC for public consideration (as noted above, the 2005 Code is summarised at Chapter 4 to this draft determination and is provided at Attachment 1). This draft determination is in relation to ADMA's proposal to revoke authorisation A40077 in relation to its 1999 Code and replace by substitute authorisation of its 2005 Code.
- 1.27 References in this draft determination to the "ADMA Code" or "Code" unless otherwise stated are in respect to the final 2005 version. Note however, that submissions received from interested parties are all in relation to the 2004 Code. Changes made to the Code following submissions have been noted in the relevant sections of this draft determination. In releasing this draft determination for public comment the ACCC is seeking the views of interested parties in respect of ADMA's 2005 Code.

# Background<sup>1</sup>

- 2.1 Set out below is a brief outline of materials considered to be relevant to the ACCC's consideration of the ADMA application for revocation of authorisation A40077 and replacement by substitute authorisation A90876.

## Direct marketing

- 2.2 Marketing is a form of communication between a marketer of goods or services and a prospective customer. Direct marketing generally involves marketers communicating with a prospective customer, without the use of an intermediary, via a medium that supports some degree of interaction. It is a broad ranging practice that may involve the receipt of marketing information through the following mediums:

- direct mail, for example unaddressed printed matter, letters, catalogues, stuffers;
- fax;
- telephone, for example telemarketing;
- electronic channels, for example, email, mobile phone short message service (SMS), the Internet;
- mail order;
- television;
- newspapers and magazines;
- radio;
- classified directories;

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<sup>1</sup> Information in this section has been sourced from: the Review of the MCCA Direct Marketing Model Code of Practice Discussion Paper 2002; Further information provided by ADMA to the ACCC on 5 September 2003; Commercial Economic Advisory Service of Australia as quoted in BRW July 15-21 2004; BRW December 9 2004; ADMA website – [www.adma.com.au](http://www.adma.com.au); Commercial and Economic Advisory Service of Australia Direct Marketing Survey 2002 Report; ADMA Code Authority Annual Report 1999 – 2000; ADMA Code Authority Annual Report 2002/2003; ADMA News Release *ADMA Code Authority calls for Code changes/resolves most consumer complaints in 2001/2002* 14 April 2003; Direct Marketing Model Code of Practice Review Report September 2003; Office of the Federal Privacy Commissioner submission February 2004; *Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act*, Office of the Federal Privacy Commissioner; Australian eMarketing Code of Practice; and the Australian Communications Authority website – [www.aca.gov.au](http://www.aca.gov.au).

- shopping docket; and
  - exhibitions.
- 2.3 Direct marketing involves the use of a database of contact details for potential customers. More sophisticated databases can be used, extending beyond merely containing customers' addresses or telephone numbers and including information on customers' previous purchases, their preferences and financial and demographic status. Direct marketers compile these lists of consumers and their contact details from a wide variety of sources. These include public records, including the white pages, the electoral roll, registers of births, deaths and marriages and land titles registers. They also include membership lists of business, professional and trade organisations, survey returns and mail order purchase information. Organisations that have their own database of consumers to whom they supply goods or services, for example, telephone companies and other utilities, may also use their database for direct marketing. Direct marketers may also acquire databases from other direct marketers.
- 2.4 The direct marketing industry includes:
- fundraisers who solicit donations from the public using a means of distance communication; and
  - organisations which contract or propose to contract for the sale of goods and services to a customer where;
    - the customer is contacted through a means of distance communication; and
    - customers are invited to respond using a means of distance communication; and
    - it is intended that the goods and services be supplied under a contract negotiated through a means of communicating at a distance; and
    - a record of the transaction is captured and maintained on a list or database for further marketing purposes.
- 2.5 Participants in direct marketing can be divided into two broad groups:
- users of direct marketing techniques; and
  - suppliers of direct marketing services.
- 2.6 Users of direct marketing techniques include companies involved in business and industrial services, charities and fundraisers, consumer product manufacturers and distributors, financial services, health care, industrial product manufacturers and distributors, telecommunication companies, travel services, airlines, hotels and retailers. Organisations that market their products and services directly to

- consumers and businesses via telephony, advertising mail and other print media such as catalogues and magazines, direct-response television and radio, the internet and other new interactive media.
- 2.7 Suppliers of direct marketing services provide technical and creative support, goods and services, and include companies involved in computer services and software database management, delivery and distribution, direct marketing and advertising agencies, electronic media and interactive services, lists, mailhouses and fulfilment services, and telemarketing services.
- 2.8 ADMA states that direct marketing is not an industry as such; rather it is a data-driven marketing discipline employing a number of channels from the traditional direct mail to mobile marketing. The new technologies such as SMS technology were not envisaged at the time of the original authorisation.
- 2.9 ADMA considers that barriers to entry are very low and that there are any number of small organisations which could broadly be described as direct marketers, most of which are not ADMA members, operating at any one time. Particularly since the advent of the Internet, the numbers fluctuate considerably. It is therefore impossible to quantify the proportion of ADMA's 'market share' as would be the case with a manufacturing or retailing activity.
- 2.10 Direct marketing has experienced strong growth in recent years. In 2003, spending on direct marketing by companies grew by 7.9% to \$9.4 billion, placing it \$100 million ahead of mainstream media advertising expenditure. BRW claims that direct marketing has enjoyed two years of very solid growth and this is expected to continue in 2005, largely because of its increased popularity among big companies, which are looking at the most efficient, measurable ways to reach their customers. BRW claims that spending on direct marketing now exceeds media advertising spending in Australia.
- 2.11 Direct marketing, and distance selling in particular, has many specific characteristics which cause it to differ from shop front retailing. These include the consumer's lack of opportunity to inspect goods prior to entering into the purchase contract, the fact that transactions are often initiated by the direct seller without the consumer's consent and that consumers may not have sufficient opportunity to research the goods and services they have been offered or compare their quality or performance against similar products. These characteristics may pose specific risks for consumers.
- 2.12 The Ministerial Council on Consumer Affairs (MCCA) has identified that consumer problems with direct marketing basically involve three areas:
- fair trading issues, including
    - information disclosure
    - cooling off periods;

- privacy issues, such as concerns about the use of personal information for mailing lists, the inability to prevent such use or to remove personal information from existing lists; and
- telemarketing, such as calling consumers at home at inconvenient times, and the use by telemarketers of silent numbers.

### **The Australian Direct Marketing Association (ADMA)**

- 2.13 Established in 1966, ADMA is a non-profit industry body to represent the collective interests of its members who participate in direct marketing activities. ADMA conducts advocacy, promotion, education and networking activities for the benefit of its members and administers a Code of Practice, compliance with which is compulsory for all members. A Board of Directors elected from the ADMA membership determines ADMA's strategic direction.
- 2.14 ADMA claims to be Australia's largest association for information-based marketers and that its members are responsible for over 80 per cent of the \$17.5 billion annual direct marketing media spend in Australia across the two broad categories discussed earlier in paragraphs 2.5 and 2.6, namely, users of direct marketing techniques and suppliers of direct marketing services.
- 2.15 These organisations include financial institutions, publishers, catalogue and mail-order traders, internet-based marketers and service providers, airlines and travel services, charities and fundraisers, call centres and telecommunications service providers, printers, delivery services, advertising agencies, list and database specialists, and other organisations involved in business-to-business direct response.

### **The ADMA Code of Practice**

- 2.16 The ADMA Code is a self-regulatory Code governing direct and data-driven marketing. The Code sets out specific standards of conduct for participants in direct marketing in relation to their customers and the public. All members of ADMA and their employees, agents, sub-contractors and suppliers of ADMA members are bound by the Code. The ADMA Code provides that all members ensure their suppliers are familiar with the Code compliance obligations of the member. This broadens the scope of the Code beyond the membership of ADMA.
- 2.17 ADMA states that its Code not only promotes fair trading, but is intended to serve as a point of reference for members to ensure they comply with all applicable state and commonwealth laws. The 2005 Code is discussed in greater detail at Chapter 4.
- 2.18 Prospective ADMA members are given a grace period of six months (or longer in agreed circumstances) to put systems in place to ensure that their organisation is Code compliant. The Code Authority states that, during this period, it would

expect the new member to take all reasonable steps to deal with complaints in accordance with the Code.

### **The ADMA Code Authority**

- 2.19 In 1999, the ADMA Code Authority was established as an independent body to enforce and monitor compliance with the ADMA Code. The Code Authority produces annual reports detailing its activities. The Code Authority has a range of discretionary powers, including the power to demand undertakings, publish details of offending conduct, recommend that the ADMA Board suspend or expel a member or otherwise impose sanctions.
- 2.20 The ADMA Code Authority provides recourse to consumers in cases involving an alleged breach of the code where they have not been able to resolve their complaint directly with the organisation. The Code Authority investigates unresolved consumer complaints about ADMA members, and in limited cases, non-member companies. Government agencies receiving complaints about members are able to refer them to the Code Authority for resolution.
- 2.21 While the Authority only covers ADMA members, casework involving non-members is also undertaken and where a breach of the Code is identified, the non-member is informed and urged to voluntarily comply. Such cases may also be referred to other appropriate bodies for review.
- 2.22 The Code Authority is composed of equal numbers of industry and consumer representatives and is chaired by an individual from outside the direct marketing industry. The Authority meets quarterly.
- 2.23 Should the Authority find a breach of the Code by an ADMA member, it can impose such sanctions as it considers appropriate including, without limiting the generality of its powers:
- requiring a formal apology for breach;
  - requiring corrective advertising or the withdrawal of offending advertisements or statements;
  - requiring correction or deletion of relevant records and personal information;
  - recommending refund or replacement of goods or services where appropriate;
  - requiring the Member to take specific remedial action to correct the breach and avoid reoccurrence;
  - seeking a written undertaking from the Member that the breach will not be repeated;

- recommending that the relevant supply chain or media channel used by the Member to communicate with its customers cease to supply and not cooperate with the Member in respect of future direct marketing activities planned by the member until the breach is rectified; and
  - recommending to the CEO that membership be revoked.
- 2.24 The ADMA Board of Directors may, on recommendation of the Code Authority, impose the following sanctions:
- order the payment of money, the transfer of property (including goods) or the delivery of goods;
  - suspend or cancel membership of a Member; or
  - issue a formal written admonishment to the non-compliant Member, which may, where appropriate, be made public. This will include specifically informing the membership that action has been taken. The non-compliant member will be given the opportunity to both see and comment on the statement prior to publication.
- 2.25 The Authority may also make recommendations to ADMA on possible changes to the Code. For example, in April 2003 the ADMA Code Authority recommended the following changes to the Code to promote greater consumer confidence in direct marketing:
- members who fail to register a request for inclusion on ADMA's Do Not Mail/Call after 30 days to be considered in breach of the Code. A quarter of all complaints in the 2001/02 period related to companies failing to adhere to such consumer requests;
  - members be required to respond to consumer complaints within 14 days;
  - members be required to maintain accurate and up-to-date records of complaints received; and
  - ADMA to prepare a checklist of Principles and Procedures to improve complaint handling.
- 2.26 The Authority publishes a range of information in its annual report and on ADMA's website, including details as to:
- the number of complaints received by the Code compliance officer during that year;
  - the number of breaches established by the Code compliance officer and Code Authority during that year;



- an analysis of the enforcement action taken during that year; and
- a statistical analysis of complaints by company.

2.27 The Authority has received the following number of complaints over the following 4 year period:

Year	Complaints Against Members	Total Complaints
1999 – 2000	25	33*
2000 – 2001	27	46
2001 – 2002	37	49
2002 – 2003	23	25

\* Each case involves more than one specific problem. A total of 30 complaint cases were received.

2.28 The Code Authority also has a role in recognising what appear to be systematic issues developing out of the complaints lodged.

### **The Ministerial Council on Consumer Affairs Model Direct Marketing Code of Practice**

2.29 In November 1997, the *Direct Marketing: A Model Code of Practice* (the Model Code) was released by the Ministerial Council on Consumer Affairs (MCCA) to deal with some of the problems that had been identified in relation to direct marketing.<sup>2</sup>

2.30 The objective of the Model Code is to enhance the potential for consumers to benefit from distance selling, and to improve the market for reputable business. It is also intended to prevent unreasonably intrusive forms of marketing by a variety of users of direct marketing techniques including distance sellers and fundraisers.<sup>3</sup>

2.31 Adopting the provisions of the Model Code is voluntary for organisations engaging in direct marketing. Following the release of the Model Code, ADMA agreed to substantially adopt the provisions of the Model Code.

2.32 The Model Code provides that there is to be a review three years after release and at periodic intervals thereafter. At its meeting on 21 July 2000, MCCA agreed to commence the review of the Model Code in 2001. The objective of the review was to determine the effectiveness of the Model Code in protecting consumers and

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<sup>2</sup> Review of the MCCA Direct Marketing Model Code of Practice, Discussion Paper, 2002, pg 1

<sup>3</sup> Review of the MCCA Direct Marketing Model Code of Practice, Discussion Paper, 2002, pg 8

ensure its requirements satisfy fair trading and consumer protection needs in a changing regulatory and market environment and to ensure its provisions continue to be relevant.<sup>4</sup> The review was conducted by a working party of Australian Government, State and Territory fair trading agencies.

- 2.33 In September 2003 the Review Report was released by the MCCA. The Report noted that evidence provided during the review did not provide sufficient support to form a clear view on whether the Model Code had achieved its objectives. While noting these limitations, the Report nonetheless concluded that the Model Code should be amended to tackle key areas of consumer dissatisfaction. It was considered important that such amendments did not impact adversely on the activities of reputable direct marketing businesses nor be inconsistent with the existing regulatory framework affecting direct marketing. It was agreed that self-regulatory approaches such as the Model Code may justifiably go beyond minimum legal requirements in order to set best practice benchmarks for industry members.<sup>5</sup>
- 2.34 The following amendments to the Model Code were recommended:
- (a) the National Privacy Principles (NPPs) be included in the Model Code;
  - (b) a reference to the Privacy Commissioner's Guidelines for the NPPs to be included in the Model Code;
  - (c) a 'qualified opt-in' approach to unsolicited commercial e-mail be included in the Model Code;
  - (d) increased identification information requirements for direct marketers;
  - (e) additional restrictions be placed on telemarketing hours of contact;
  - (f) direct marketers to inform third party marketers of the provisions of the Model Code;
  - (g) direct marketers to delete consumers from their marketing lists within 30 days of a request being made;
  - (h) a reference to 'Unconscionable Conduct' as included in the TPA be included in the Model Code;
  - (i) extend internal complaints handling procedures to apply to all organisations that receive consumer complaints in relation to breaches of the Model Code;

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<sup>4</sup> Review of the MCCA Direct Marketing Model Code of Practice, Discussion Paper, 2002, pg 1

<sup>5</sup> Direct Marketing Model Code of Practice Review Report, September 2003, pg 2.

- (j) require a code administration body to develop a strategy to ensure the active promotion of its code;
  - (k) MCCA to actively promote the Model Code;
  - (l) relevant parts of the Australian E-Commerce Best Practice Model (BPM) be included in the Model Code;
  - (m)a 'Forward' explaining the purpose of the Model Code and Government support for industry self-regulation be included to the Model Code and
  - (n) a permanent Direct Marketing Working Group be established in the upcoming two years to review and update the Model Code at the end of this time.
- 2.35 In conjunction with the Report, an amended Model Code was released by MCCA in September 2003. At this time MCCA announced that monitoring and review of the Model Code will now occur on a two yearly basis.
- 2.36 As previously noted in January 2004 ADMA submitted a revised Code to the ACCC for its consideration (the 2004 Code). The 2004 Code was intended to respond to issues raised by interested parties in the ACCC's earlier consultation process and to incorporate the abovementioned changes to the Model Code.

### **Commonwealth, State and Territory legislation**

- 2.37 The TPA regulates various forms of business conduct, including prohibiting misleading and deceptive conduct, unconscionable conduct, demanding payment for unsolicited goods or services, offering gifts or prizes without intending to provide them and accepting payment without intending or being able to supply as ordered. These provisions are replicated by State and Territory fair trading legislation, while fair trading legislation in Victoria and New South Wales also contain specific provisions dealing with direct marketing. All State and Territories have door to door selling legislation.

### **Privacy legislation**

- 2.37 On 21 December 2001 the *Privacy Amendment (Private Sector) Act 2000* extended the *Privacy Act 1988* (the Privacy Act) to the private sector, thus requiring private sector organisations to comply with the National Privacy Principles which set standards for handling of personal information. Prior to 21 December 2001, the amended provisions, which are slightly different and previously called 'Principles for the Fair Handling of Personal Information', were a voluntary, self-regulatory privacy scheme for the private sector, which had been incorporated by ADMA into its Code.
- 2.38 The National Privacy Principles regulate the way many private sector organisations collect, use, keep secure and disclose personal information. The private sector provisions aim to give people greater control over the way information about them

- is handled in the private sector by requiring organisations to comply with the National Privacy Principles.
- 2.39 The National Privacy Principles cover collection, use and disclosure, data quality, data security, openness, access and correction, identifiers, anonymity, trans-border data flows and sensitive information.
- 2.40 The Privacy Act does not apply to a small business operator. A small business is a business with an annual turnover of \$3 million or less. However, the small business exemption does not apply to small businesses: that are a health service; that trade in personal information; or that provide services under a Commonwealth contract. Small business operators that are not covered by the legislation can choose to opt in if they so wish.
- 2.41 Of specific relevance to direct marketers is NPP2.1(c), which allows organisations to use non-sensitive personal information for direct marketing where, amongst other things:
- it is impracticable to seek the individual's consent; and
  - where the individual is told that they can opt-out of receiving any more marketing from the organisation.
- 2.42 In August 2004, the Attorney General asked the Federal Privacy Commissioner to conduct a review of the operation of the private sector provisions of the Privacy Act. The review examined the impact of the legislation on the community and the private sector and considered if the legislation has achieved its goal of creating a comprehensive national scheme for the private sector that regulates how organisations collect, use, store, disclose and transfer individuals' personal information. The review considered the extent to which the legislation meets international concerns and Australia's international obligations relating to privacy.
- 2.43 On 18 May 2005, the Attorney-General released the Federal Privacy Commissioner's report, *Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act*, which makes recommendations covering a range of areas in respect of privacy issues. Generally, the report recommended that the Australian Government should consider undertaking a wider review of privacy laws in Australia to ensure that the legislation best serves the needs of Australia. In respect of the direct marketing industry, the report made the following recommendations:
- the Australian Government should consider amending the Privacy Act to provide that consumers have a general right to opt-out of direct marketing approaches at any time. Organisations should be required to comply with the request within a specified time after receiving the request;

- the Australian Government should consider amending the Privacy Act to require organisations to take reasonable steps, on request, to advise an individual where it acquired the individual's personal information; and
- the Australian Government should consider exploring options for establishing a national 'Do Not Contact' register.

### **Telemarketing hours**

2.44 The telemarketing hours in the original Model Code mirrored those originally prescribed by Regulation 7.8.22 of the *Corporations Regulations 2001* in respect of hawking of certain financial products. Following a series of amendments to Regulations 7.8.22 the hawking of certain financial products by telemarketers is no longer permitted on a Sunday or on national public holidays.

### **Spam Act**

2.45 Spam is a generic term used to describe electronic 'junk mail' – unwanted messages sent to your email account or mobile phone. These messages vary, and include commercial communications, for example communications seeking to persuade consumers to buy a product or service.

2.46 In Australia, spam is defined as 'unsolicited commercial electronic messaging'. Under the *Spam Act 2003* (the Spam Act), which came into effect on 10 April 2004, it is illegal to send, or cause to be sent, 'unsolicited commercial electronic messages' that have an Australian link. A message has an 'Australian link' if it either originates or was commissioned in Australia, or originates overseas but has been sent to an address accessed in Australia.

2.47 The Spam Act covers electronic messages – emails, mobile phone text messages (SMS), multimedia messaging (MMS) and instant messaging (iM) – of a commercial nature. However, the Spam Act does not cover voice or fax telemarketing. The legislation sets out penalties of up to \$1.1 million a day for repeat corporate offenders.

2.48 To comply with Australia's spam laws, a commercial electronic message must meet the following conditions:

- it must be sent with the recipient's consent. This consent may be express or inferred from previous conduct and 'existing business or other relationships' (consent);
- it must contain accurate information about the person or organisation that authorised the sending of the message (identity); and
- - it must contain a functional 'unsubscribe' facility to allow you to opt out from receiving messages from that source in the future (unsubscribe).

- Any message that does not meet these conditions is defined as spam.
- 2.49 A spam message is not necessarily sent out in 'bulk' to numerous addresses. Under Australian law, a single electronic message can also be considered spam.
- 2.50 Electronic messages from certain sources are exempted from the legislation. These include messages from:
- government bodies.
  - registered political parties.
  - charities.
  - religious organizations. and
  - educational institutions (sent to attending and former students and their households).
- 2.51 To be exempted, the message must relate to goods or services and the sender must be the supplier of those goods or services. Purely factual messages with no commercial content are also exempted, but the sender must still include accurate identifying information.

### **Australian eMarketing Code of Practice**

- 2.52 In response to the Spam Act, the Australian eMarketing Code of Practice (the eMarketing Code) was developed under Section 112(1A) of the *Telecommunications Act 1997* to establish comprehensive industry rules and guidelines for the sending of commercial electronic messages with an Australia link in compliance with the Spam Act. The eMarketing Code has been registered by the Australian Communications Authority (ACA) pursuant to section 117 of the *Telecommunications Act 1997*.
- 2.53 The eMarketing Code applies to all individuals and organisations undertaking an e-marketing activity. An 'e-marketing activity' is defined at section 109A of the *Telecommunications Act 1997* and applies to the following activities:
- activities undertaken by individuals or organisations to market, promote or advertise their own goods and services where sending or causing to send commercial electronic communications is their sole or principal means of marketing, promoting or advertising their own goods or services;
  - activities undertaken by individuals or organisations who by contract or other arrangement with a person market, advertise or promote the goods or services (including land and interests in land and business and investment opportunities) of that person by sending commercial electronic communications or causing them to be sent; and
  - activities undertaken by individuals or organisations who by contract or other arrangement with a person market, advertise or promote that person as a

supplier, prospective supplier, provider or prospective provider of goods or services (including land and interests in land and business and investment opportunities) by sending commercial electronic communications or causing them to be sent.

To the extent that entities engage in e-marketing activities, they are bound by the provisions of the eMarketing Code in respect of those activities.

- 2.54 The eMarketing Code does not apply to the actions of individuals or organisations involved in the sending of commercial electronic messages who are not engaged in eMarketing activities as described above. However, such entities remain subject to the Spam Act and may choose to use the eMarketing Code provisions.
- 2.55 The *Telecommunications Act 1997* provides the ACA with powers to investigate complaints, issue warnings to comply and direct compliance with registered codes of practice (whether the industry member is a signatory to the code or not). A failure to comply with a direction issued by the ACA can result in court action and the imposition of pecuniary penalties. The eMarketing Code provides for industry to actively resolve and monitor complaints where appropriate. Where complaints are not satisfactorily resolved or breaches of the eMarketing Code arise the ACA may pursue enforcement action.

## Authorisation A40077

- 3.1 On 16 August 1999, authorisation A40077 was granted by the ACCC to ADMA for its arrangements to adopt a Direct Marketing Code of Practice (the 1998 Code) and to enforce the provisions contained in the 1998 Code. A copy of the ACCC's 1999 determination is available from the ACCC's public register.

### *Summary of ACCC's assessment of A40077*

- 3.2 In its original assessment, the ACCC found that the application of the provisions of the 1998 Code was often limited by its narrow definition of 'direct marketer'. The ACCC considered that little or no public benefit arose from such limited application and required ADMA to make a number of amendments in order to broaden the scope of the 1998 Code. The ACCC considered that incorporation of these amendments meant that, at its narrowest, provisions contained in the 1998 Code would apply to ADMA members who contact potential customers via a means of distance communication and invite consumers to respond using a means of communication at a distance with the intention of supplying goods and services under a contract negotiated at a distance. At its broadest, the 1998 Code would apply to all ADMA members.
- 3.3 The ACCC noted that the 1998 Code contained a number of rules outlining standards of fair conduct generally, standards relevant to telemarketing, standards relevant to electronic commerce, and standards relevant to consumer data protection. The ACCC was of the view that these rules, once the subject of appropriate scope and a number of other amendments, had the potential to give rise to a number of public benefits in so far as they:
- provided consumers with rights additional to those that are granted at law, for example, the right to a seven day cooling off period and to a refund in appropriate circumstances;
  - protected consumers from unreasonable intrusive forms of direct marketing, and protect consumers' right to privacy; and
  - provided consumers with recourse to a resolution mechanism where they have complaints about products or services they have purchased, or the conduct of an ADMA member.
- 3.4 The ACCC however considered that the extent to which the 1998 Code would in practice be likely to benefit the public depended upon the level of compliance with the rules it established. In this respect the ACCC had a number of concerns with the structure and operation of the 1998 Code's enforcement provisions including, the independence and accountability of decision-making bodies, the remedies available, and the complaints handling process. The ACCC thus required a number of amendments to the enforcement provisions of the 1998 Code.



- 3.5 The ACCC granted authorisation in respect of the 1998 Code until 16 August 2003. However, the authorisation did not come into effect until the ACCC notified ADMA that it was satisfied that the 1998 Code had been amended to address a number of concerns, including those outlined above. These requirements were subsequently addressed by ADMA.
- 3.6 The authorisation was also subject to a number of additional conditions requiring ADMA to keep the 1998 Code up to date with regulatory developments as reflected in amendments to the Mode Code of Practice for the Direct Marketing Industry, the OECD Guidelines for Consumer Protection in the context of Electronic Commerce, and the National Principles for the Fair Handling of Personal Information, on which 1998 Code was based.

### **Independent reviews of the 1998 Code**

- 3.7 The ACCC sought information from ADMA as to whether or not independent reviews of the Code, as outlined in Provision H of the original authorisation, had been conducted on a regular basis and their outcomes. ADMA submitted that the ADMA Board of Directors decided to undertake the review of the 1998 Code subsequent to the review of the MCCA Model Code to ensure that additions or amendments to the MCCA Model Code can be considered by the independent panel undertaking the review of the 1998 Code.
- 3.8 ADMA noted that MCCA undertook to review its Model Code within a three year period and submitted that, had this deadline been adhered to, the review of the 1998 Code would have been undertaken prior to the reapplication for authorisation.
- 3.9 ADMA conducted a review of the 1998 Code in the second half of 2003 resulting in a revised Code (the 2004 Code). The 2004 Code was considered as part of the ACCC's public consultation process preceding this draft determination.

## **Application for revocation and substitution – the 2005 Code of Practice and supporting submission**

- 4.1 As noted at paras 1.16 to 1.27 of this draft determination, on 25 July 2003, ADMA lodged an application under section 91C of the TPA seeking to revoke its original authorisation (A40077) and obtain a substitute authorisation to the 1999 Code in its place (A90876). ADMA sought re-authorisation to make a contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or might have the effect, of substantially lessening competition within the meaning of the TPA; and to give effect to such a provision.
- 4.2 The application has been made on behalf of each current and future member of ADMA.
- 4.3 ADMA also sought interim authorisation to ensure that immunity from the TPA was retained whilst the ACCC considered the substantive application for revocation and substitution. The ACCC granted interim authorisation to the 1999 Code on 13 August 2003.
- 4.4 On 30 January 2004, ADMA lodged a revised Code (the 2004 Code) for consideration as a proposed substitute authorisation.
- 4.5 On 29 June 2005 ADMA provided a confidential draft of the proposed 2005 Code for the ACCC's information.
- 4.6 On 16 September 2005 ADMA provided a non-confidential copy of the 2005 Code with further amendments to the ACCC for public consideration. This draft determination is in relation to ADMA's proposal to revoke authorisation A40077 in relation to its 1999 Code and replace by substitute authorisation of its 2005 Code.
- 4.7 A copy of the application, 1999 Code, 2004 Code, 2005 Code and submissions by ADMA in support of its application are available from the ACCC's public register.
- 4.8 An overview of the 2005 Code is provided below.

### **Overview of the ADMA Code of Practice**

- 4.9 The proposed 2005 Code establishes specific standards of conduct for participants in the direct marketing industry in relation to their customers and the public. All members of ADMA and their employees, agents or sub-contractors are currently bound by the 1999 Code. In the event that substitute authorisation is granted by the ACCC, ADMA members and their employees, agents, sub-contractors and suppliers to ADMA members will be bound by the terms of the 2005 Code.

4.10 Sections D and G of the 2005 Code apply not only to member organisations, but also to fundraisers and charities trying to generate donations.

4.11 The objectives of the 2005 Code are to:

- ensure business and consumers have access to the product and service information they need to make informed choices;
- minimise the risk of members breaching the Trade Practices Act 1974, Privacy Act 1988 including the National Privacy Principles (NPPs), Spam Act 2003 or state fair trading legislation;
- promote a culture among members of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
- increase business and consumer confidence in doing business with ADMA members.

4.12 The 2005 Code is divided into nine parts:

- Part A – Introduction
- Part B – Interpretations and Definitions
- Part C - Marketing Claims
- Part D – Fair Conduct Relevant to Telemarketing
- Part E – Fair Conduct Relevant to Email Marketing and Electronic Commerce
- Part F – Fair Conduct Relevant to Mobile Marketing
- Part G – Fair Conduct Relevant to Consumer Data Protection
- Part H – Respecting Consumer Preference
- Part I – Enforcement
- Part J – Code Review and Amendment

A brief outline of the key provisions contained in each Part is provided below.

#### *Part A - Introduction*

4.13 Part A outlines the objectives of the 2005 Code, why the 2005 Code is necessary, and the scope of the 2005 Code. Part A also responds to possible conflicts with legislative requirements, and notes that such requirements will prevail.

### *Part B - Interpretations and Definitions*

4.14 Part B provides a definition of terms arising in the 2005 Code.

### *Part C – Marketing Claims*

4.15 Part C essentially outlines general standards of fair conduct applicable to all types of direct marketing. This part of the 2005 Code covers topics relating to the dissemination of information and conditions of direct marketing transactions, including: misleading or deceptive conduct; false claims; the content of communication; information at the time of offer; information at the time of delivery; unfair conduct; terms and conditions under which incentives, rewards, prizes, or gifts are offered; prohibition of pyramid selling; availability of goods or services; delivery; conditions related to continuing series; payment; cancellation and refunds; unordered goods or services; substituted goods or services; treatment of minors; and responding to a complaint.

### *Part D – Fair Conduct Relevant to Telemarketing*

4.16 Part D outlines standards of fair conduct specifically in respect of telemarketing, including information required to be disclosed at the earliest opportunity and on request, acceptable conduct, permitted calling times, the use of answering machines and standards in relation to automated dialling equipment, programmed voice calling systems and call recording.

### *Part E – Fair Conduct Relevant to Email Marketing and Electronic Commerce*

4.17 Part E provides standards in respect of email marketing and online transactions, including the requirement that organisations comply with the Australian eMarketing Code of Practice and/or the Spam Act 2003. In addition, Part E of the code provides instructions regarding specific information which must be provided to consumers transacting online, confirmation processes, payment details and dispute resolution.

### *Part F – Fair Conduct Relevant to Mobile Marketing*

4.18 Part F applies to organisations involved in marketing via mobile wireless technology. This part provides that members must comply with the Australian eMarketing Code of Practice and/or the Spam Act 2003. This part further provides general rules relating to subscription services and premium rate services and that members only send location based mobile marketing messages to recipients who have given consent.

### *Part G – Fair Conduct Relevant to Consumer Data Protection*

4.19 Part G reflects statutory obligations imposed on private sector organisations by the National Privacy Principles under the *Privacy Act 1998 (C'th)* (as amended by the *Privacy Amendment (Private Sector) Act 2000*). This part of the 2005 Code relates

to privacy requirements, including the collection, use and disclosure of personal information, data security, the ability for an individual to access and correct their personal information, use of identifiers, transborder data flows and the collection of sensitive information. This part of the code also addresses the use of third party contacts and supply of personal information by third party data suppliers.

#### *Part H – Respecting Consumer Preference*

4.20 Part H outlines standards in respect of suppression files, including the requirements that Members must operate and maintain a suppression file, listing recipients who have indicated that they do not wish to receive further marketing communications. This part provides that all amendments to suppression files must be made within 45 days including details on time limits on amendments to suppression files. In addition, this part of the Code outlines the use of ADMA’s Do Not Mail and Do Not Call services, including the requirement that members use the ADMA ‘Do Not Mail’ and ‘Do Not Call’ services when conducting a direct marketing campaign.

#### *Part I - Enforcement*

4.21 Part I refers to ADMA’s ability to enforce the 2005 Code. The scope of ADMA’s enforcement procedures is limited to alleged breaches of the 2005 Code. It does not extend to:

- mediation of consumer complaints, which do not involve an alleged breach of the Code and would normally be dealt with by a member’s internal complaints handling process; and
- contractual disputes between suppliers and users of direct marketing services.

4.22 In addition to reacting to complaints received from any regulator, individual or consumer, the Code Authority may instigate investigation without receipt of a written complaint where it has reason to believe that a member company is acting in breach of a provision of the 2005 Code.

#### *Part J – Code Review and Amendment*

4.23 Part J provides that the 2005 Code shall be subject to independent review on a regular basis and that the ADMA Board may at any time resolve to amend the 2005 Code.

### **ADMA submissions in support of application**

#### *Public Benefit*

4.24 ADMA claims that the public benefits identified in authorisation A40077 were manifest and will continue to result from the proposed arrangements:

- (a) significant promotion and enhancement of consumer protection. The restrictions on the conduct of ADMA members will protect consumers by:
- ensuring they have access to the product and service information they need to make informed choices;
  - respecting privacy at a higher level than the minimum legal requirement;
  - promoting a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
  - protecting consumers from false, misleading or unsafe claims;
- (b) ensuring members put in place the best possible complaint handling procedures particularly due to the enhancements recommended by the Code Authority incorporated in the Code;
- (c) providing consumers with a flexible complaints handling procedure in relation to alleged breaches of the Code by ADMA members;
- (d) responsible development of the direct marketing industry which will:
- a. increase supply, provide consumers with more purchasing options, promote competition and market efficiency, thereby exerting downward pressure on prices; and
  - b. increase access to and demand from off-shore markets which will boost the volume of exports;
- (e) promotion of consumer confidence to make purchasing decision by a direct marketing channel which:
- a. will enable consumers to take advantage of more convenient methods of purchase; and
  - b. is likely to enable consumers to benefit from lower prices made possible by the lower cost structures required for direct marketing sales compared to shop-front retail sales;
- (f) consumer views being taken into account by the presence of an independent chairman and two consumer representatives on the Code Authority, the composition being a condition of Authorisation A40077. Member sanctions and some of the proposed amendments to the Code itself have been and will be a product of public input.
- (g) the promotion of equitable dealings in the direct marketing industry and
- (h) improvements in the quality and consistency of the service received by consumers from direct marketers.

### *Market features*

- 4.25 ADMA submits that most members of the public at some stage in any 12 month period will have been contacted by or will have heard or seen offers by direct marketers.
- 4.26 ADMA considers that the following characteristics of direct marketing make the direct marketing industry different from the shop-front retail industry:
- increased spending on direct marketing compared to static or negative growth in traditional media including free-to-air television, radio and print advertising;
  - the person contacted may be a minor, intellectually impaired or have poor language skills;
  - the person may not have chosen to be contacted by a direct marketer and may not have had sufficient opportunity to research the goods or services offered so as to minimise his or her risk of making an ill-informed purchasing decision; and
  - there is no opportunity to inspect the actual goods prior to entering into a purchase contract.
- 4.27 ADMA states that these characteristics necessitate greater restriction on the conduct of direct marketing industry participants so that the disreputable acts of a few do not jeopardise the reputation of the majority. ADMA submits that public confidence is pivotal to the continued pattern of responsible growth in what is still a growing industry.
- 4.28 ADMA submits that its Code was a response to a need to provide customers and potential customers with further, but not onerous safeguards to protect their interests. ADMA states that in the absence of a code of practice, its members will lack guidance as to responsible and appropriate conduct which may result in harm to the direct marketing industry.
- 4.29 ADMA considers the use of sanctions, such as revocation of ADMA membership, as necessary to deter irresponsible conduct and encourage compliance with the Code. ADMA states that the administration of the sanctions by the Code Authority and by the Board of Directors of ADMA is and will be undertaken with a high level of propriety involving fairness and impartiality. ADMA submits that in order to ensure that the Code Authority's role is performed with propriety, the Code Authority will continue to comprise an equal number of consumers and industry representatives and an independent chair.

*Anti-competitive detriment*

- 4.30 ADMA submits that the arrangements in the Code which have the potential for anti-competitive detriment are:
- the conduct of ADMA members is restricted beyond that required by relevant State, Territory and Commonwealth legislation;
  - the imposition of sanctions (including the revocation of membership of ADMA) where a member of ADMA is found to be in breach of the Code; and
  - the imposition of sanctions against the member where an agent, or subcontractor of the member is found to be in breach of the Code.
- 4.31 ADMA contends that the level of anti-competitive detriment likely under the amended Code is less than was the case in the original application because of the introduction into law of the private sector amendments to the Commonwealth *Privacy Act 1988* and the Anti-Hawking provisions of the *Financial Services Reform Act* relating to sale of financial services products over the telephone.
- 4.32 ADMA states that as a consequence of these legislative reforms, the restrictions imposed by the Code on the conduct of ADMA members *beyond* that required by relevant State, Territory and Commonwealth legislation has been lessened. ADMA considers that in other respects the Code is still relevantly prescriptive in relation to:
- the information to be provided when an offer is made to a potential customer and at the time of delivery;
  - the procedures to be adhered to when delivery is delayed;
  - the requirement to provide, in most cases, a cooling-off period of 7 days or more within which the customer may cancel the purchase contract in addition to statutory rights in some jurisdictions;
  - the requirement that telemarketers identify themselves to potential customers;
  - limiting the times when telemarketers may telephone potential customers other than calls subject to the Anti-Hawking provisions of the *Financial Services Reform Act*.
- 4.33 ADMA submits that, give its member profile, restrictions such as those listed above have the potential to standardise the way in which participants in the direct marketing industry conduct their business and engage in trade. ADMA considers that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another and, as such, is anti-competitive.



- 4.34 ADMA contends, however, that the standards and restrictions do not go beyond what are widely accepted as prudent and fair business practices. Furthermore, ADMA submits that the standards and restrictions have no impact on the great scope direct marketing participants have to differentiate themselves via their products and the type of technology used to contact potential customers or transact a sale. In particular, ADMA considers that recent technological advances in electronic and mobile marketing as well as product development and greater access to world markets has meant that the boundaries for such differentiation are limitless.
- 4.35 ADMA contends that the restrictions on the conduct of its members is directed more towards promoting the interests of consumers than the prevention of competition between members. The availability of sanctions for a breach of the Code is directed at encouraging compliance with the Code without unduly burdening ADMA members.
- 4.36 ADMA notes that a significant number of participants in the direct marketing industry are members of ADMA. ADMA considers that the imposition of a sanction whereby a member has its membership revoked has the potential to be anti-competitive. In particular, ADMA considers that it is possible that the inability of a direct marketing industry participant to be a member of ADMA may mean that the participant suffers detriment as a result of the following:
- potential customers, whose policy is to deal only with an ADMA member, refusing to deal with the participant;
  - the participant being denied access to the advocacy, education and networking activities conducted by ADMA; and
  - members, whose policy is to deal only with other ADMA members, refusing to deal with a supplier.

*Period for which authorisation is sought*

- 4.37 ADMA is seeking authorisation for a period of five years.
- 4.38 ADMA submits that the successful operation of the Code, the relatively low level of complaints, the ability of the Code and Code Authority to adapt to a fast changing technological environment and the lack of any demonstrated lessening of competition since authorisation A40077 justify an extended period of authorisation for this application.

# ACCC assessment

## Introduction

- 5.1 ADMA has sought authorisation to make a contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or might have the effect, of substantially lessening competition within the meaning of the TPA; and to give effect to that provision.
- 5.2 The ACCC's evaluation of this application is made in accordance with the relevant statutory test that is outlined in Chapter 1 of this draft determination.
- 5.3 In general terms, the ACCC is required to determine whether the provisions of the 2005 Code for which the ADMA 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.
- 5.4 It should be noted that the ACCC's role in the authorisation process is not to design, or insist upon, the development of an ideal code of conduct, it is constrained in this respect by its statutory duty. In *Re Media Council of Australia (No. 3)*<sup>6</sup> the Australian Trade Practices Tribunal (now the Australian Competition Tribunal) made the following observation with respect to its own role:

“... an important matter to have in mind when approaching our analysis of the Codes is that the Tribunal's function is not to require the design of an ideal system of code administration within the advertising industry, but to determine whether the proposed Codes within the Media Council system fulfil the statutory tests prescribed by sec. 90 of the *Trade Practices Act*.”

Further, in *Re:7 – Eleven Stores Pty Ltd, Independent Newsagents Association, Australasian Association of Convenience Stores Inc*<sup>7</sup> the Australian Competition Tribunal (the Tribunal) stated the following:

“... the Commission's role is not to design for others business arrangements that can be authorised, nor insist on optimum arrangements before granting authorisation, but rather to assess formally whether some proposed conduct that might breach the provisions of the Act yields a net public benefit, and therefore can be authorised.”

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<sup>6</sup> (1989) ATPR 40-933 at page 50, 123

<sup>7</sup> AUSTLII [1998] ACompT 3 (18 November 1998)

## **The relevant markets**

- 5.5 Consistent with the statutory tests the ACCC must assess the public benefits and anti-competitive detriments resulting from the arrangements for which substitute authorisation has been sought. This assessment is conducted within the context of the relevant market/s. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that net public benefit will or will not arise regardless of the scope of the defined market.
- 5.6 The ACCC has not received any submissions from the applicant or interested parties in relation to market definition. However, the applicant has contended that direct marketing may be thought of as a technique rather than an industry, in that it is a technique used by businesses for communicating with customers.
- 5.7 In its consideration of this application, the ACCC considers that it is not necessary to fully define the scope of the relevant markets. The proposed arrangements will apply whatever definition is adopted.
- 5.8 In respect of the product market, the ACCC notes that it could be defined as wide so as to include all marketing and sales services or a subset thereof.
- 5.9 In respect of the geographic market, the ACCC considers it to be nationally based. The ADMA Code applies to all of its members. The ACCC also notes that some forms of direct marketing communication are potentially limitless and borderless in their reach to consumers. One of the main characteristics of the direct marketing industry is the lack of face to face contact between buyers and sellers.
- 5.10 For the purpose of assessing the current application, the ACCC considers the relevant area of competition to be that of the marketing and sale of goods and services in Australia.
- 5.11 The ACCC notes that the direct marketing industry has grown considerably since the original authorisation was granted and that additional methods of communicating with consumers such as e-mail and short messaging service are now more prominently used by the direct marketing industry.

## **The counterfactual**

- 5.12 In order to identify and measure the public benefit and anti-competitive detriment generated by the conduct for which authorisation is sought, the ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The ACCC will compare the public benefit and anti-competitive detriment that will result in the future if authorisation is granted with the counterfactual.

- 5.13 With respect to this application for revocation and substitution, the ACCC is limiting its assessment to those parts of the 2005 Code which differ from existing legislation.
- 5.14 The ACCC proposes to consider the following three possible counterfactuals:
- (a) ADMA may choose to continue operating the Code under its current terms; or
  - (b) ADMA may withdraw its Code from the marketplace due to possible legal risk; or
  - (c) ADMA may revise its Code to reduce possible legal risk.
- 5.15 As noted previously, ADMA has sought authorisation under section 88(1) of the TPA to permit it, its members and future members, to engage in an arrangement which may have the effect of substantially lessening competition within the meaning of the TPA. In light of this perceived legal risk, the ACCC considers that it would be unlikely that ADMA would choose to continue operating the Code under its current terms. Accordingly, the ACCC does not consider (a) above to be a likely counterfactual.
- 5.16 In the situation where authorisation is denied and ADMA chooses to withdraw its Code from the marketplace (counterfactual (b) above), the ACCC notes that ADMA members would still be subject to obligations contained in various Commonwealth, State and Territory legislative regimes – including the provisions of the TPA, State and Territory fair trading acts, the *Privacy Act* and the *SPAM Act*. In such circumstances, the ACCC considers that those provisions of the ADMA Code which are in addition to the requirements imposed by the legislative regimes would only be adopted by ADMA members on an individual, voluntary basis. ADMA members choosing not to introduce these voluntary requirements, or those members who voluntarily adopt but fail to appropriately adhere to these requirements, would not be subject to sanction by ADMA.
- 5.17 In the situation where authorisation is denied and ADMA chooses to revise its Code to reduce possible legal risk (option (c) above), the ACCC considers that the most likely changes will be to provisions of the Code which impose requirements which are in addition to those required by the legislative regimes. It is also likely that ADMA would amend those provisions imposing sanctions upon members for non-compliance with the Code. The ACCC does not consider that these two classes of provisions would necessarily be removed from a revised Code, but it is considered more likely that they will be lessened to some degree. In these circumstances ADMA would continue to provide guidance and assistance to its members in respect of their compliance with the Code.
- 5.18 On balance, the ACCC considers that counterfactual (c) is the most likely alternative should authorisation be denied.

## **Effect of the ADMA Code on competition**

5.19 ADMA has submitted that the following aspects of its Code have the potential to result in anti-competitive detriment:

- the conduct of ADMA members is restricted beyond that required by relevant State, Territory and Commonwealth legislation;
- the imposition of sanctions (including the revocation of membership of ADMA) where a member is found to be in breach of the Code; and
- the imposition of sanctions against the member where an agent, or subcontractor of the member is found to be in breach of the Code.

5.20 One interested party submitted that the anti-competitive strength of the Code is weak and insufficient to require authorisation. However, some interested parties have submitted that anti-competitive detriments may flow from the sanctions contained in the Code resulting in an organisation having their membership withdrawn from ADMA placing that organisation at a commercial disadvantage due to the following:

- some ADMA members refuse to deal with non-ADMA members;
- some third parties prefer to deal only with ADMA members;
- there are some reputational advantages to belonging to ADMA;
- there are general benefits of belonging to an industry association with a high profile for political lobbying; and
- there are some qualification and training packages and education initiatives linked exclusively to ADMA members.

5.21 One concern which may arise in the context of an industry association's code of conduct is whether the ability to become a member or continue to remain a member of that industry association has the potential to create a barrier to entry for new participants to enter the direct marketing industry or affects the ability of current participants in the market to compete. The ACCC considers that public detriment arising from a lessening of competition may flow from the disciplinary processes for enforcing a code of conduct of an industry association where membership of the association is necessary to compete or significantly assists a business to compete, and either:

- the code of conduct contains broadly-expressed provisions open to subjective interpretation by disciplinary tribunals, and the disciplinary processes do not provide association members with sufficient procedural fairness. A risk might then arise that members could be expelled for anti-competitive purposes (in

particular, so as to exclude them from the market) and that this would happen enough times to reduce the intensity of competition in the market; or

- there is evidence that the number of members likely to be expelled for actually acting unethically is likely to constitute such a proportion of the market that expulsion of these businesses from the association (while likely to generate offsetting public benefits) would reduce the intensity of competition in the market.<sup>8</sup>
- 5.22 In respect of the arrangements for which authorisation is sought, the ACCC proposes to consider the following issues:
- (a) the effect of ADMA membership on a business' ability to compete;
  - (b) impact on the direct marketing industry;
  - (c) conduct beyond that required by Commonwealth, State and Territory legislation;
  - (d) burden on members to comply with Code; and
  - (e) standardising the way in which members conduct their business.

*The effect of ADMA membership on a business' ability to compete*

- 5.23 The purpose of an industry code of conduct is to improve the efficiency of business and strengthen the confidence of consumers. Membership of a recognised code of conduct may constitute an important selling point for businesses to attract new customers, and may increase the bargaining power of the business when entering into arrangements with other parties. However, codes of conduct should not seek to unduly increase barriers to market entry.
- 5.24 An interested party submitted that the focus of the (then 2004) Code appears to be on promoting good consumer relations between consumers and ADMA members, rather than preventing competition between industry participants.
- 5.25 However, as noted earlier, interested parties have submitted that non-membership of ADMA may affect a business' ability to compete, particularly as some ADMA members refuse to deal with non-ADMA members, some third parties prefer to deal only with ADMA members and there are some alleged reputational advantages of belonging to ADMA. While ADMA has acknowledged these concerns, it considers that the restrictions imposed by the Code are directed more towards promoting the interests of consumers than the prevention of competition between members.

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<sup>8</sup> In either case, detriment could also arise if other penalties (eg. financial) for breaching the code might affect a sufficient number of firms so that the intensity of competition in the market is reduced.

- 5.26 The ACCC acknowledges that the imposition of sanctions (including the revocation of membership of ADMA) where a member is found to be in breach of the Code may mean that the excluded member suffers detriment as a result of potential customers and/or other ADMA members refusing to deal with an organisation who is not a ADMA member, and the organisation being denied access to the advocacy, education and networking activities conducted by ADMA.
- 5.27 However, the ACCC notes that there are other associations to which participants in the direct marketing industry may belong to, for example: Direct Sellers Association of Australia, Australian Teleservices Association, Market Research Society of Australia, Association of Market Research Organisations, Internet Industry Association and the Fundraising Institute of Australia. The ACCC considers it likely that these associations would offer similar benefits to their members to those offered by ADMA. More generally, the ACCC notes that membership of ADMA is not a pre-condition of participation in the direct marketing industry.
- 5.28 Given this, the ACCC considers it unlikely that loss of/or inability to obtain ADMA membership would significantly impede a direct marketers' ability to enter the market or to compete within the industry. In this respect the ACCC is aware of the decision of a significant direct marketing organisation to withdraw from ADMA. The ACCC understands that this decision has not had a significant impact upon this business' ability to participate in the direct marketing industry.

*Impact on direct marketing industry*

- 5.29 In its application ADMA claimed that, should authorisation not be granted, businesses may suffer due to a lack of consumer confidence in the direct marketing industry if there is not an industry regulated code. ADMA submitted that, in the absence of its Code, its members would lack guidance as to responsible and appropriate conduct which may result in harm to the direct marketing industry.
- 5.30 While the ACCC notes the beneficial guidance that can be provided to industry through the adoption of an appropriate industry code, it considers that the extent to which such a code would promote consumer confidence, and therefore have a positive effect on competition, is by matter of function affected by the level of consumer awareness of the code.
- 5.31 In this respect that ACCC is concerned that indicators of consumer awareness of the ADMA Code are not strong. In particular the low level of complaints received by the ADMA Code Authority may demonstrate a lack of consumer awareness of the Code. Interested parties have also provided submissions expressing concern that a lack of consumer awareness is a point of weakness for the ADMA Code.
- 5.32 On balance, the ACCC is not satisfied that the existence and enforcement of the ADMA Code is likely to have such a significant impact upon consumer perceptions of the direct marketing industry, such that a failure to authorise the Code would result in a significant loss of competitive benefit.

*Conduct beyond that required by Commonwealth, State and Territory Legislation*

- 5.33 In its submission supporting its application, ADMA submitted that the level of anti-competitive detriment possible under the amended Code is less than was the case in the 1999 Code due to the introduction of the amendments to the *Privacy Act* and the *Financial Services Reform Act* which have the effect of lessening the restrictions on the conduct of ADMA members beyond that required by relevant State, Territory and Commonwealth legislation.
- 5.34 ADMA submits however that the Code is still relatively prescriptive in relation to non-legislative requirements placed on its members under the Code.
- 5.35 Various Commonwealth, State and Territory legislation regulates the behaviour of various types of direct marketing business operations.
- 5.36 For example, the TPA regulates various forms of business conduct, including prohibiting misleading and deceptive conduct, unconscionable conduct, demanding payment for unsolicited goods or services, offering gifts or prizes without intending to provide them and accepting payment without intending or being able to supply as ordered. As has been previously noted, these provisions are replicated by State and Territory fair trading legislation. The ADMA Code seeks to replicate these provisions, as well the provisions of *The Privacy Act* (National Privacy Principles), the *Spam Act* and the eMarketing Code, in a consolidated form in its 2005 Code.
- 5.37 The ACCC considers it appropriate for self-regulatory approaches to go beyond minimum legal requirements in order to set better practice benchmarks for industry members. In this regard, the ACCC considers that in many cases it unlikely that the Code will create a barrier to entry for new participants or impede the ability of existing participants to compete in the market. The ACCC considers that the provisions of the Code which exceed existing legislative obligations may actually assist new participants and existing participants as better business practices may be adhered to.
- 5.38 The ACCC considers that the level of anti-competitive detriment likely to flow from the existence and enforcement of the ADMA Code is significantly lessened due to the current legislative obligations which exist regardless of the Code. The ACCC considers it unlikely that significant anti-competitive detriment will flow from those provisions placing additional obligations on ADMA members.

*Burden for members*

- 5.39 It was submitted by interested parties that Code compliance and membership of ADMA impose a number of burdens on direct marketers, in particular in the form of additional expenditure and annual membership fees. While it has not addressed this issue, ADMA has submitted that the availability of sanctions for a breach of the Code is directed at encouraging compliance with the Code without unduly burdening ADMA members.



- 5.40 Having considered the information provided to it, the ACCC does not consider annual membership fees are likely to be overly burdensome and/or significant in relation to the organisation's annual gross revenue. For example, the ACCC understand that an organisation with annual gross revenue of \$10 million would incur \$18,480 (including GST) annually in ADMA membership fees. The ACCC also notes that ADMA membership is not compulsory for participants in the direct marketing discipline such that any additional expenses could be avoided if considered by a business to be unduly burdensome.
- 5.41 The ACCC notes that, in many instances, the majority of the Code compliance is already required under various Commonwealth, State and Territory legislation. In this respect, the ACCC does not consider that compliance with the ADMA Code would be significantly more onerous or burdensome for an organisation than generally complying with legislation and conducting business in a professional and courteous manner.
- 5.42 In light of these factors the ACCC does not consider it likely that burdens placed on organisations to comply with the ADMA Code will result in any significant anti-competitive detriment.

*Standardising the way in which members conduct their business*

- 5.43 ADMA has stated that its Code may have the potential to standardise the way in which participants in the direct marketing industry conduct their business and engage in trade. It was submitted that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another.
- 5.44 However, ADMA contends that the standards and restrictions do not go beyond what are widely accepted as prudent and fair business practices. ADMA further submits that standards and restrictions have no impact on the great scope direct marketing participants have to differentiate themselves via their products and the type of technology used to contact potential customers or transact a sale. ADMA submits that, recent technological advances in electronic and mobile marketing, as well as product development and greater access to world markets, has meant that the boundaries for such differentiation are limitless.
- 5.45 The ACCC recognises that the ADMA Code's requirements are prescriptive and promote a degree of standardisation in the way in which participants in the direct marketing industry conduct certain aspects of their business and may, to a degree, stifle innovation amongst members. It could be argued that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another. However, the ACCC does not consider the requirements of the Code to go beyond standards which are widely accepted as prudent and fair business practices. The ACCC also considers there to be scope for ADMA members to differentiate themselves via their products and the types of technology used to contact potential customers to transact a sale. Finally, there is no restriction

on direct marketing organisations to self-adhere to higher standards and practices than those prescribed by the ADMA Code.

### **Conclusion on likely effect of the ADMA Code on competition**

5.46 Overall, for the reasons outlined above, the ACCC considers that the ADMA Code is likely to generate minimal public detriment constituted by any lessening of competition.

### **Benefits to the public resulting from the ADMA Code**

5.47 The ACCC notes that direct marketing has many characteristics which cause it to differ from shop-front retailing. For the purposes of consumer protection and consideration of ADMA's Code, the consumer's lack of opportunity to inspect goods prior to entering into the purchase contract, the fact that transactions are often initiated by the direct seller without the consumer's consent and that consumers may not have sufficient opportunity to research the goods and services that have been offered are most relevant. For these reasons, the ACCC recognises the potential for unethical conduct in the direct marketing industry. Consequently, the ACCC considers there to be potential for a public benefit to arise from the existence and enforcement of the ADMA Code. Fundamentally, the ACCC considers that determining whether a public benefit actual flows from the ADMA Code depends upon:

- adequate consumer and business awareness of the ADMA Code and provisions contained within the ADMA Code;
- compliance with the ADMA Code;
- effective and independent enforcement of the provisions of the ADMA Code;
- independent monitoring of Code compliance; and
- the application of appropriate sanctions upon members who breach provisions of the ADMA Code.

5.48 In the ACCC's assessment of the original application, it considered that the following benefits were likely to flow from the arrangements:

- providing consumers with rights additional to those that are granted at law, for example, that right to a seven day cooling-off period and to a refund in appropriate circumstances;
- protecting consumers from unreasonable intrusive forms of direct marketing, and protect consumers' right to privacy; and

- providing consumers with recourse to a resolution mechanism where they have complaints about products or services they have purchased, or the conduct of an ADMA member.
- 5.49 However, the ACCC further considered that the extent to which the ADMA Code would in practice be likely to benefit the public depended upon the level of compliance with the Code's rules.
- 5.50 In this respect ADMA has submitted that the public benefits identified in the 1999 authorisation have manifested and will continue to result from the proposed arrangement. However, a number of interested parties have expressed concern that, since the original grant of authorisation, the ADMA Code has not resulted in any real benefit to consumers.
- 5.51 For the purposes of identifying and assessing the potential benefits to the public of the ADMA Code, the ACCC proposes to consider the following:
- (a) the extent to which the Code is responsive to changing circumstances;
  - (b) the extent to which the Code impose requirements upon members which are in addition to those imposed by legislation ;
  - (c) the extent to which the Code is effectively administered.

*Responsiveness of the Code*

- 5.52 The ACCC considers that regular review of an industry code is essential in ensuring that the standards incorporated by the code are meeting its identified objectives and remain consistent with legislative requirements and community expectations.
- 5.53 In this respect, the ADMA Code provides that it shall be subject to independent review on a regular basis, with the review body (not being the Code Authority) to consist of an independent chair and equal number of industry and consumer/community representatives. The Code also requires that, in conducting a review of the Code, the review body should, where appropriate, consult with groups affected by the Code.
- 5.54 While ADMA has stated that the Code is in response to the needs of customers and potential customers, interested parties have expressed concern as to the lack of review and maintenance of the ADMA Code to take into consideration the changing environment.
- 5.55 The ACCC notes that the ADMA Code has been evolving since it was originally lodged with the ACCC for authorisation in September 1998. This evolution has, in part, been in reaction to consultation by the ACCC with stakeholders in respect of the Code. In particular, the ACCC notes that ADMA has amended the Code on two occasions since the lodgement of its current application in response to changes

in the market place and concerns raised by interested parties during the authorisation process.

- 5.56 The ACCC is however concerned that the review provisions of the Code as currently drafted fail to provide certainty to interested and affected parties that the Code will remain in step with a changing environment. To the extent that the ADMA Code fails to respond on a timely basis to such changes it may result in detriment to the public.
- 5.57 While the ACCC notes that that ADMA has, in recent times, conducted informal reviews on a more frequent basis, it is clear that the Code has failed to achieve ongoing currency with legislative developments. In this respect the ACCC notes that changes to the Victorian *Fair Trading Act 1999* which extend the cooling off period applicable in that state and provisions dealing with allowable calling hours are not reflected by the ADMA Code. While the ADMA Code does make it clear that, to the extent the provisions of the Code are inconsistent with legislative requirements, those legislative requirements will prevail, the ACCC is nonetheless concerned that this does not provide adequate notice to members and consumers that specifically identifiable higher standards apply.
- 5.58 Having considered the information provided to it, and while noting recent improvements, the ACCC is nonetheless concerned that review provisions of the ADMA Code provide inadequate safeguards and fail to ensure that the Code remains responsive to developments in the direct marketing environment. Accordingly the ACCC considers that the benefits to the public resulting from a responsive code are diminished in respect of the ADMA Code.
- 5.59 It is noted however that were the Code to formally provide for independent review on a suitably regular basis these public benefits would be increased. In this respect the ACCC notes that the MCCA review of the Model Code is scheduled to occur on a bi-annual basis.

*Requirements upon members in addition to those established by legislation*

- 5.60 As was the case in its 1999 determination, the ACCC considers that the level of public benefit resulting from the ADMA Code is linked largely to those standards or requirements of the Code which are in addition to those imposed by legislation. A key consideration of this however is the level of industry adherence to these standards and the level of consumer awareness.
- 5.61 The ACCC notes that the ADMA Code imposes a number of standards or requirements upon members which are more stringent than those already provided through legislation. Some of these additional features are discussed below. More generally, the ACCC notes that various legislative regimes complement these additional features.
- *Complaints handling* - the ADMA Code mandates the adoption by members of a complaints handling system. Members are required to keep records of

complaints received, acknowledge complaints within five working days, take appropriate action to resolve complaints and refer any potential breaches of the ADMA Code that cannot be resolved between the parties to ADMA.

- *Automated dialling equipment* - the ADMA Code contains a series of rules for the use of automatic dialling equipment, including record keeping and time limits on how long a dialler may ring for, and how frequently a number may be dialled.
- *Programmed voice calling systems* - under the ADMA code, the prior consent of the person being called is required before a programmed voice calling system may be used.
- *Do not contact facilities* – The ADMA code mandates the use of ADMA’s “Do not mail” and “Do not call” Opt out services for members when they are conducting a direct marketing campaign. Further to this, the ADMA Code states that a member organisation must operate a suppression file and must suppress a customer from its marketing database no more than 45 days after the customer makes a request for removal. If this is not possible the marketer must inform the customer and may continue to contact them for a maximum of 7 days.
- *Dispute resolution* - the ADMA Code provides that consumers should be provided with meaningful access to fair and timely alternative dispute resolution and redress without undue burden or cost.
- *Information to be provided at the time of offer and at the time of delivery* - the ADMA Code sets out what information must be provided by the supplier, both at the time the offer is made and at the time the goods are delivered or services are carried out. At the time of offer the potential customer must be supplied with the full company name, Australian Business Number or Australian Company Number, a postal address for the suppliers premises (non-PO Box), a fixed line telephone number, email address, the price, delivery arrangements and any terms and conditions associated with the sale. The potential customer must also be advised of their rights to cancel the sale (cooling-off), of any explicit warranties and details of after sales service available. At the time of delivery the customer must be provided, in writing, with a name and a street address to which they can direct any inquiries or complaints and, if necessary, return the goods and cancel the contract. The customer must also receive details of the payment arrangements, a copy of the terms and conditions, the full cash price, instructions for proper use and their rights regarding refunds, cancellation and exchange of goods.
- *Delivery* - the ADMA Code prescribes the procedure that its members must follow when delivering goods or services. The order must be filled either in the time stated in the sales promotion or, if no time frame is specified, within 30 days of the order being received. If the supplier is unable to supply the product

in the time specified by the promotion, or the implied timeframe of 30 days, they must send a notice to the customer stating a new delivery date, reasons for the delay and provide the opportunity for the customer to cancel the contract. If the supplier is unable to supply the product by the new delivery date they must either repeat the process stated above or send the customer a full refund.

- *Payment* - The ADMA Code requires that members must not accept payment until it either has the goods in its possession or has immediate access to the services and there is no impediment to supply.
- *Incentives & prizes* - the ADMA Code sets out rules relating to the offering of incentives and prizes relating to the sale of goods and services. The terms and conditions of receiving the incentive or prize must be clearly stated, they must be delivered within a reasonable time frame (no more than 30 days). If the supplier is then unable to deliver at or before the specified date, the customer must be advised of the delay, provided with a new delivery date, given reasons for the delay and offered a full refund. Any competition prizes must be awarded as described in the terms and conditions, be promptly judged, and certified by third party auditors.
- *Specific information in respect of telemarketing* - the ADMA Code places specific obligations on its members when they are conducting telemarketing campaigns. At all times the member must recognise the right of the other party to terminate the call. The member must provide the caller with the name of the organisation that they represent, the purpose of the call, which country the call is being made from and ensure that the other party is provided with appropriate contact details for the organisation. Furthermore, under the ADMA Code, the operator conducting the telemarketing call must, upon request, provide the other party with the name of the person within the organisation responsible for handling complaints and inquiries, details of the goods or services being offered and the source from which the telemarketer obtained the other parties information. If the telemarketer is unable to provide this information upon request it must be provided in writing within 30 days.

The ACCC notes that in May 2005 the Telecommunications Industry Ombudsman (TIO) issued a media release indicating that repeated telemarketing calls from the same telecommunications companies are becoming a more frequent source of complaint to the TIO and calling on the telemarketing industry to improve telemarketing call practices. Concerns were raised by the TIO that some telecommunications companies do not have proper processes in place to ensure that consumers' details are removed from telemarketing lists on request.

The ACCC also notes a significant increase in the number of complaints it has received in respect of telemarketing in recent months.

- 5.62 It is noted however that, in regard to some of the provisions of ADMA's Code, legislative requirements impose a higher standard of practice. In particular, the Victorian *Fair Trading Act 1999* provides for a cooling off period of up to 10 days and provisions regarding allowable calling hours are more prescriptive than provided for in the ADMA Code.
- 5.63 A key concern expressed by interested parties is that the ADMA Code falls short in promoting best practice. In particular interested parties are concerned that the ADMA Code does not require industry practice and standards that are significantly beyond those already required by legislation. Interested parties consider that this is a significant deficiency of the ADMA Code.
- 5.64 As has been noted previously, the ACCC considers that where a standard established by the ADMA Code is not reflective of a standard imposed by legislation, ADMA must take reasonable steps to make clear to members that a higher standard applies to consumer transactions conducted in the relevant jurisdiction. Alternatively, ADMA could choose to amend the Code to reflect such higher standards. More generally however the ACCC considers that the ADMA Code offers a number of features which are beneficial to consumers which may not be maintained were authorisation to be denied. The weight of public benefit assigned to these features however is linked to the level of industry adherence to the Code and consumer awareness of the Code's features.
- 5.65 Interested parties have expressed concern that ADMA Code fails to achieve uniform coverage of direct marketing providers – and furthermore that unscrupulous direct marketers are unlikely to be members of ADMA. Interested parties have also expressed concern that the Code is poorly promoted to raise consumer awareness. While not an accurate measure, the ACCC notes that the number of complaints reported as having been received by the Code Authority is significantly lower than the number of direct marketing related complaints received by other agencies, including the ACCC itself. This suggests that consumers may be unaware of the alternate avenues of recourse available to them under the ADMA Code and accordingly these avenues are under utilised.
- 5.66 In respect of the coverage of the ADMA Code, the ACCC notes that all employees, agents, sub-contractors and suppliers of ADMA members are bound by the Code. This, in effect, extends the coverage of the Code beyond simply ADMA members. Furthermore, the ACCC notes that sections D and G of the Code are extended to apply not only to ADMA Members, but also to fundraisers and charities trying to generate donations. As a general principle, the ACCC considers that the more direct marketing participants that are signatories to the ADMA Code, the greater the potential benefits to the public. However it is difficult to identify what additional steps may reasonably be taken by ADMA to compel greater industry coverage of the Code. The ACCC notes that it is in ADMA's interest to represent all direct marketers operating in Australia – the ACCC considers that this self interest provides ADMA with a clear incentive to seek to continually grow its membership base, and therefore, coverage of the Code.

5.67 The ACCC remains concerned however that the ADMA Code would be more effective if there were greater consumer awareness as to its existence. Based upon current indicators of awareness the ACCC is not satisfied that significant weight should be attached to the potential benefits to the public of the ADMA Code. The ACCC notes that increased promotion of the Code by ADMA and its members, for example by requiring members to notify consumers of the Code's complaints handling scheme, would assist in increasing consumer awareness of the Code.

#### *Administration of the Code*

5.68 As noted previously, the ADMA Code is enforced and monitored by the ADMA Code Authority (the Code Authority). The Code Authority was established by ADMA as an independent body and consists of:

- (a) an independent Chairperson;
- (b) two consumer representatives, being persons with special competence in consumer and industry matters; and
- (c) two industry representatives, being persons of good character and repute in the direct marketing industry.

5.69 Under the ADMA Code, where the Code Authority finds that a member has been in breach of the Code, it may impose sanctions it considers appropriate. These sanctions include requiring a formal apology, corrective advertisement or the withdrawal of offending advertisements or statements, correction or deletion of records and personal information, recommending refunds or replacement of goods or services, requiring the member to take remedial action, seeking a written undertaking that the breach will not be repeated, recommending that the relevant supply chain or media channel used by the member to communicate with its customers to cease supply until the breach is rectified; recommending to the ADMA Chief Executive Officer that membership be suspended or revoked. Furthermore, the ADMA Board of Directors may, on recommendation of the Code Authority, order the payment of money, the transfer of property or the delivery of goods, suspend or cancel membership of a member, or issue a formal written admonishment which may be made public.

5.70 If non-members are found to be in breach, ADMA will inform the relevant government regulator.

5.71 A number of concerns have however been raised by interested parties concerning the transparency of the Code Authority and its activities; complaints handling under the Code; and enforcement of the Code.

#### *Transparency and activities – the Code Authority*

5.72 In particular concerns have been raised by interested parties as to the actual and/or perceived independence of the Code Authority from ADMA. It was submitted that



the Code Authority is a private function within ADMA and that there is no public disclosure of matters which are related to the independence of the Code Authority members, such as how they are selected; what they are paid; the length of nature of the contracts they are on; non-disclosure agreements regarding their interaction with ADMA and its members; and no minutes of meetings or public disclosure of communication between the Code Authority and ADMA.

- 5.73 While the ACCC notes that the Code Authority is required to publish an annual report covering a range of matters, including the number of complaints received and an analysis of enforcement action, it is concerned that the activities of the Code Authority could be made more widely known, thereby increasing its accessibility and transparency to interested and affected parties.
- 5.74 The ACCC also notes that recommendations made by the Code Authority to ADMA on possible changes to the Code are not required to be implemented by ADMA. To the extent that the recommendations of the Code Authority are not be followed by ADMA, without public disclosure of such recommendations and ADMA's response, the perceived powers and independence of the Code Authority may be weakened. On balance, the ACCC is concerned that the current provisions of the ADMA Code in respect of the Code Authority are likely to diminish its perceived independence, which in turn diminishes confidence of affected parties in the ADMA Code. The ACCC considers that this lessens the public benefits associated with the ADMA Code.

#### *Complaints handling*

- 5.75 The ADMA Code provides that any party that considers that an ADMA member has breached a provision of the Code may lodge a complaint with ADMA. Under the Code, complaints can only be lodged in writing to the Code Compliance Officer at ADMA. In the instances where the Code Compliance Officer considers that an ADMA member may have breached the Code and that member is not able to demonstrate compliance within a reasonable period of time, the complaint shall be referred to the Code Authority for its consideration. The Code Authority may also instigate an investigation without a written complaint where it has reason to believe that a member company is acting in breach of the Code.
- 5.76 In the event that a complainant is dissatisfied with a decision made by the Code Compliance Officer, there are avenues for review of the decision by the Code Authority.
- 5.77 As noted previously, interested parties have expressed concern that the Code is poorly promoted to raise consumer awareness.
- 5.78 While the Code establishes a mechanism by which consumers may lodge complaints with the Code Compliance Officer or Code Authority, the ACCC is concerned that the inability for consumer to lodge complaints through other means, including by telephone or by e-mail, may have the effect of preventing some

consumers from lodging complaints. The ACCC considers that this is a significant weakness of the ADMA Code's complaint handling provisions.

#### *Code enforcement*

- 5.79 As noted above the ADMA Code establishes a range of sanctions which may be imposed where the Code Authority finds a member to be in breach of the Code. Such sanctions include formal apologies, publishing of corrective advertisements, correction or deletion of records and personal information, recommendations as to refunds or replacement of goods or services, or otherwise requiring a member to take remedial action. The Code Authority may also recommend to the ADMA Chief Executive Officer that membership be suspended or revoked.
- 5.80 Concerns were however raised by interested parties that these provisions have been weakly, and seldom, enforced. In particular interested parties submitted that the Code regime is vulnerable to the disengagement of parties (members) when even mild sanctions are proposed. It was submitted that this compounds the problem of limited industry coverage. Furthermore, interested parties submitted that there is not a hugely compelling necessity to subscribe to the Code and not a particularly threatening consequence to unsubscribing.
- 5.81 The ACCC notes that, should an ADMA member be dissatisfied with ADMA or choose not to comply with the Code, they can simply resign their ADMA membership. The ACCC understands that, since the authorisation of the 1999 Code, an ADMA member has chosen to resign from ADMA after concerns were raised as to that member's compliance with the Code. The ACCC considers that, while significantly limiting the effectiveness of this aspect of the Code, the freedom to disassociate is an inherent feature of a voluntary code.
- 5.82 On balance the ACCC considers that the ADMA Code establishes sufficient sanctions to provide remedies to consumers and/or businesses affected by non-compliance. The ACCC considers however that the limitations discussed above in respect of consumer awareness of additional rights conferred by the ADMA Code, and therefore the utilisation of these rights, limits the effectiveness of the ADMA Code and therefore diminishes the potential benefits to the public.

#### **Conclusion on public benefits likely to result from the ADMA Code**

- 5.83 The ACCC considered that, given its objectives, the ADMA Code has the potential to result in benefits to the public.
- 5.84 Overall, the ACCC considers that the ADMA Code continues to provide consumers with some rights and avenues additional to those that are granted at law and continues to provide consumers with recourse to a resolution mechanism where they have complaints regarding the conduct of an ADMA member.
- 5.85 As is evident from interested parties submissions, there is wide spread concern that the ADMA Code does not go far enough in protecting consumers and could be

more strongly enforced. While ADMA has made a number of key improvements to the Code, the ACCC nonetheless agrees with interested parties that further improvements in a number of key areas would improve the effectiveness of the ADMA Code and would be likely to result in greater benefits to the public than currently arise.

- 5.86 However as has been discussed previously, it is not the ACCC's role and it is not so empowered, to improve proposals or to ensure best practice where there is an absence of public detriment flowing from the proposed arrangements. In considering applications for authorisation, the ACCC's role is to assess whether the public benefits arising from proposed arrangements outweigh the public detriments.

#### *Regulation*

- 5.87 Interested parties also argued that authorisation of the ADMA Code may prevent the momentum of more interventionist approaches such as a mandatory direct marketing Code or Federal legislation to govern the direct marketing industry. A number of interested parties submitted that tighter regulation is necessary for the direct marketing industry.
- 5.88 While the ACCC notes the arguments of interested parties that legislation is required to regulate the direct marketing industry, the ACCC does not consider that the existence of the ADMA Code will necessarily directly prevent the development of legislation should it be considered necessary by government. In this respect the ACCC notes developments in State and Territory fair trading legislation intended to enhance the protections offered to consumers in transactions, including those engaged in by means of direct marketing.

## **Balance of public benefits and anti-competitive detriment**

- 6.1 As noted previously, for the ACCC to grant authorisation to the ADMA Code, it must be satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 6.2 In considering whether this test has been met the ACCC must weigh the ADMA arrangement against what it considers to be the most likely counterfactual. In the circumstances presented, the ACCC considers that, in the absence of authorisation, ADMA is likely to revise its Code to reduce possible legal risk.
- 6.3 In particular, the ACCC considers that the most likely changes will be to provisions of the Code which impose requirements which are in addition to those required by the legislative regimes. It is also likely that ADMA would amend those provisions imposing sanctions upon members for non-compliance with the Code. The ACCC does not consider that these two classes of provisions would necessarily be removed from a revised Code, but it is considered more likely that they will be lessened to some degree. In these circumstances ADMA would continue to provide guidance and assistance to its members in respect of their compliance with the Code.
- 6.4 In considering the possible detriments to the public that may result from the lessening of competition, the ACCC notes the following:
- the loss of/or inability to obtain ADMA membership is unlikely to significantly impede a direct marketers' ability to enter the market or to compete within the industry;
  - the level of anti-competitive detriment likely to flow from the existence and enforcement of the ADMA Code is significantly lessened due to the current legislative obligations which exist regardless of the Code. The ACCC considers it unlikely that significant anti-competitive detriment will flow from those provisions placing additional obligations on ADMA members;
  - it is not likely that burdens placed on organisations to comply with the ADMA Code would result in any significant anti-competitive detriment; and
  - while the withdrawal of the ADMA Code may benefit businesses involved in direct marketing to the extent that they are able to have greater flexibility in the

ways in which they operate within their legislative obligations, the ACCC recognises the role the Code plays in guiding ADMA members to comply with their legislative obligations.

- 6.5 Overall, the ACCC considers that detriments to competition resulting from the ADMA Code are likely to be minimal.
- 6.6 As a general principle, the ACCC considers that an industry code responding to and appropriately addressing concerns about direct marketing has the potential to result in significant benefits to the public.
- 6.7 However as is evident from interested parties submissions, there is wide spread concern that the ADMA Code does not go far enough in protecting consumers and could be more strongly enforced. While ADMA has made a number of key improvements to the Code, the ACCC nonetheless agrees with interested parties that further improvements in a number of key areas would improve the effectiveness of the ADMA Code and would be likely to result in greater benefits to the public than currently arise.
- 6.8 However as has been discussed previously, in considering applications for authorisation, the ACCC's role is to assess whether the public benefits arising from proposed arrangements outweigh the public detriments. It is not the ACCC's role, and it is not so empowered, to improve proposals or to ensure best practice where there is an absence of public detriment flowing from the proposed arrangements.
- 6.9 Overall, the ACCC considers that the ADMA Code continues to provide consumers with some rights and avenues additional to those that are granted at law and continues to provide consumers with recourse to a resolution mechanism where they have complaints regarding the conduct of an ADMA member.
- 6.10 On balance, the ACCC considers that the ADMA Code is likely to result in some, albeit reduced, benefits to the public. As has been noted above, the ACCC considers that the corresponding detriments to competition resulting from the ADMA Code are likely to be minimal.
- 6.11 Following consideration of the arguments advanced by the applicant and interested parties and amendments made to the Code during the authorisation process, the ACCC is satisfied that the public benefits likely to result from the proposed Code are likely to outweigh the potential anti-competitive detriments of those arrangements. Accordingly the ACCC proposes to grant authorisation to the 2005 ADMA Code.
- 6.12 It is important to note that, were it to be made more effective, the ADMA Code would have the potential to generate far greater public benefits than those recognised by this draft determination.

## Authorisation period

- 7.1 In its application, ADMA requested an authorisation period of five years. ADMA claimed that the successful operation of the Code, the relatively low level of complaints, the ability of the Code and Code Authority to adapt to a fast changing technological environment and the lack of any demonstrated lessening of competition since the original authorisation justify an extended period of authorisation.
- 7.2 The ACCC proposes to grant authorisation to the ADMA Code for a period of three years from the date the authorisation comes into force. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 7.3 The ACCC also notes that the MCCA review of the Model Code will be conducted on a two year cycle. It is important that the ADMA Code remains consistent with the Model Code, therefore it is assumed that the ADMA Code may require amendment within the next three years.
- 7.4 In this context, the ACCC considers a three year authorisation appropriate to allow for review of the ADMA Code, the direct marketing environment and further assessment of the extent to which likely public benefits have eventuated.

# Draft Determination – application for revocation & substitution

## The Application

- 8.1 On 16 August 1999, the ACCC issued a final determination granting authorisation A40077 to the Australian Direct Marketing Association (ADMA) in respect of ADMA's arrangements to adopt a Direct Marketing Code of Practice (the 1999 Code) and to enforce the provisions contained in that Code. Authorisation A40077 was granted under subsection 88(1) of the TPA to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition, within the meaning of section 45 of the TPA.
- 8.2 On 25 July 2003, ADMA lodged an application under section 91C of the *Trade Practices Act 1974* for a revocation and substitution with authorisation A90876. When it was initially lodged, the substitute authorisation sought was essentially the same as A40077 except for its expiry date.
- 8.3 On 13 August 2003, the ACCC suspended the operation of authorisation A40077 and granted interim authorisation to the substitute arrangements (the then current Code), pending ACCC consideration of the application.
- 8.4 On 30 January 2004, ADMA submitted a revised Code of Practice for consideration by the ACCC in its assessment of a substitute authorisation. The revised Code of Practice is significantly different to the previously authorised Code and is now the subject of the substitute authorisation.
- 8.5 On 16 September 2005, ADMA submitted a further revised Code of Practice for consideration by the ACCC in its assessment of a substitute authorisation. This draft determination is in respect of the 2005 Code of Practice.

## The Statutory Test

- 8.6 Pursuant to section 91C (7) of the TPA, and for the reasons outlined in Chapter 5 of this draft determination, the ACCC is satisfied that the proposed revocation and substitution of authorisation A40077 is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements.

## Conduct authorised

- 8.7 Accordingly, the ACCC proposes, subject to any pre-determination conference requested and further submissions, to revoke authorisation A40077 and grant substitute authorisation A90876 to ADMA's revised Direct Marketing Code of Practice.

- 8.8 Application A90876 replaces authorisation A40077 which was made under subsection 88(1) of the TPA for an authorisation to make and give effect to a contract, arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect of, substantially lessening competition within the meaning of section 45 of the TPA.
- 8.9 This application relates to the revised ADMA Direct Marketing Code of Practice submitted to the ACCC on 16 September 2005.
- 8.10 Pursuant to section 88(10) of the TPA authorisation is also proposed to apply to any other person who subsequently becomes a party to the contract, arrangement and understanding constituted by the ADMA Direct Marketing Code of Practice at a time after authorisation is granted.

#### **Time limit**

- 8.11 The ACCC proposes to grant the substitute authorisation for a period of three years from the date on which the authorisation comes into force. In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.

#### **Interim authorisation**

- 8.12 While the terms of the proposed authorisation differ to the current interim authorisation, granted to ADMA on 13 August 2003, the ACCC does not propose to alter the interim authorisation. Those arrangements will continue to be protected from action under the TPA until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke or amend the interim authorisation.



# **Attachment 1**

**ADMA Direct Marketing Code of Practice, September 2005**

**ADMA**

**DIRECT MARKETING  
CODE OF PRACTICE**

**SEPTEMBER 2005**

**(DRAFT)**

<b>A. INTRODUCTION.....</b>	<b>5</b>
WHAT IS THE CODE?.....	5
WHY IS THE CODE NECESSARY? .....	5
STATEMENT OF OBJECTIVES.....	5
SCOPE OF THE CODE .....	5
CONFLICT WITH LEGISLATION.....	6
CITATION.....	6
<b>B. INTERPRETATIONS AND DEFINITIONS .....</b>	<b>7</b>
DEFINITIONS .....	7
<b>C. MARKETING CLAIMS .....</b>	<b>11</b>
MISLEADING OR DECEPTIVE CONDUCT .....	11
FALSE CLAIMS .....	11
MARKET RESEARCH CLAIMS .....	11
MEMBER SUPPLIERS.....	11
CONTENT OF DIRECT MARKETING COMMUNICATIONS .....	11
INFORMATION AT THE TIME OF OFFER.....	12
INFORMATION AT THE TIME OF DELIVERY .....	12
UNFAIR CONDUCT .....	13
INCENTIVES .....	13
<i>Delivery of gifts, prizes or free items .....</i>	<i>13</i>
<i>Contests, lotteries or sweepstakes.....</i>	<i>13</i>
PYRAMID SALES .....	14
AVAILABILITY OF GOODS OR SERVICES.....	14
DELIVERY .....	14
<i>Delayed delivery .....</i>	<i>14</i>
CONTINUING SERIES .....	15
PAYMENT .....	15
CANCELLATION AND REFUNDS .....	15
<i>Cooling-off period of 7 days or more.....</i>	<i>15</i>
<i>When the cooling-off period does not apply.....</i>	<i>16</i>
<i>Method of cancelling a contract pursuant to rights during a cooling off period.....</i>	<i>16</i>
<i>Cost of returning goods .....</i>	<i>16</i>
<i>Option to cancel a contract for continuing series of goods or services.....</i>	<i>17</i>
<i>Payment of refunds .....</i>	<i>17</i>
UNORDERED GOODS OR SERVICES .....	17
SUBSTITUTED GOODS OR SERVICES.....	18
MINORS .....	18
<i>Collection of personal information from minors.....</i>	<i>18</i>
<i>Content of commercial communications directed at minors.....</i>	<i>19</i>
RESPONDING TO A COMPLAINT .....	19
<b>D. FAIR CONDUCT RELEVANT TO TELEMARKETING .....</b>	<b>21</b>
STATUS.....	21
SCOPE.....	21
COURTESY AND PROCEDURES .....	21
IDENTIFICATION INFORMATION.....	21
<i>Calling line identity.....</i>	<i>22</i>
INFORMATION TO BE PROVIDED ON REQUEST.....	22
GUISE OF RESEARCH .....	22
COLLECTION OF PERSONAL DATA .....	22
ACCEPTABLE CALLING CONDUCT .....	22
PERMITTED CALLING TIMES .....	23
LINE DISCONNECTION TIMES.....	23

CALLING FREQUENCY .....	23
ANSWERING MACHINES .....	23
RANDOM AND SEQUENTIAL DIALLING EQUIPMENT .....	23
AUTOMATED DIALLING EQUIPMENT .....	24
PROGRAMMED VOICE CALLING SYSTEMS .....	24
<b>E. FAIR CONDUCT RELEVANT TO EMAIL MARKETING AND ELECTRONIC COMMERCE</b>	<b>26</b>
.....	
EMAIL MARKETING .....	26
TRANSACTIONING ONLINE.....	26
CONFIRMATION PROCESS.....	27
PAYMENT .....	27
DISPUTE RESOLUTION AND REDRESS .....	27
<i>Applicable Law and Jurisdiction</i> .....	27
<i>Alternative dispute resolution and redress</i> .....	27
<b>F. FAIR CONDUCT RELEVANT TO MOBILE MARKETING.....</b>	<b>28</b>
SCOPE.....	28
INTERPRETATION .....	28
MOBILE MARKETING.....	28
LOCATION BASED MOBILE MARKETING.....	28
5 .....	28
Members must only send location-based mobile marketing messages to Recipients that have given Express Consent to the receipt of such communications.....	28
SUBSCRIPTION SERVICES .....	28
PREMIUM RATE.....	29
<b>G. FAIR CONDUCT RELEVANT TO CONSUMER DATA PROTECTION.....</b>	<b>30</b>
COMPLIANCE WITH THE PRIVACY ACT 1988 .....	30
USE OF THIRD PARTY CONTACTS FOR DIRECT MARKETING PURPOSES .....	30
SUPPLY OF PERSONAL INFORMATION BY THIRD PARTY DATA SUPPLIERS .....	30
<b>H. RESPECTING CONSUMER PREFERENCE .....</b>	<b>32</b>
SUPPRESSION LISTS .....	32
<b>I. ENFORCEMENT .....</b>	<b>34</b>
COMPLAINT RECEIVED BY ADMA.....	34
COMPLAINT INITIATED BY CODE AUTHORITY .....	34
RESPONDING TO COMPLAINTS RELATED TO ALLEGED BREACH OF THE CODE .....	34
<i>No breach of the Code</i> .....	34
<i>Lack of jurisdiction</i> .....	35
<i>Potential breach of Code by non-Members</i> .....	35
<i>Potential breach of the Code by Member</i> .....	35
<i>Hearing before the Authority</i> .....	36
<i>Sanctions for Breach</i> .....	36
<i>Non-Members</i> .....	37
<i>Charges</i> .....	37
<i>Publication of Enforcement Action</i> .....	38
<b>J. CODE REVIEW AND AMENDMENT.....</b>	<b>39</b>
REVIEW .....	39
AMENDMENT .....	39

## **A. INTRODUCTION**

### **WHAT IS THE CODE?**

- 1 The Code sets out specific standards of conduct for participants in the direct marketing industry in relation to individuals and consumers and serves as a benchmark in settling disputes.
- 2 The requirements of the Code are based on common sense and are matters of fairness and honesty. The Code not only promotes fair-trading but also is intended to serve as a point of reference for Members to ensure they comply with all applicable state and commonwealth laws.

### **WHY IS THE CODE NECESSARY?**

- 3 Direct marketing is expanding rapidly. More consumers are choosing to purchase goods and services through direct response channels and more businesses are using these media to meet this increasing demand. Because they operate at a distance rather than face to face with consumers, direct marketing organisations place a greater emphasis on building consumer confidence and trust. This is especially true in respect of their handling of personal information such as name, address and other identifying information.
- 4 The future expansion of direct marketing depends on the players conducting their business in a fair, honest and ethical manner, both in dealings with other businesses and consumers. Only by doing so can the reputation of the industry be enhanced so that consumer demand will continue to grow.

### **STATEMENT OF OBJECTIVES**

- 5 The objectives of the Code are to:
  - 5.1 ensure business and consumers have access to the product and service information they need to make informed choices;
  - 5.2 minimise the risk of Members breaching the, *Trade Practices Act 1974*, *Privacy Act 1988* including the National Privacy Principles (NPPs), *Spam Act 2003* or State fair trading legislation;
  - 5.3 promote a culture among Members of conducting their businesses fairly, honestly, ethically and in accordance with best practices; and
  - 5.4 increase business and consumer confidence in doing business with ADMA Members.

### **SCOPE OF THE CODE**

- 6 The Code binds all ADMA Members and all employees, agents, subcontractors and suppliers of ADMA Members. Sections D and G of the Code are extended to apply not only to Member, but also to fundraisers and charities trying to generate donations.
- 7 An alleged breach of the Code by a Member of ADMA, its employees, agents or subcontractors will be dealt with in accordance with the enforcement provisions of the Code.
- 8 It is the responsibility of all ADMA Members to ensure their suppliers become familiar with the Code compliance obligations of the Member. In addition, Members that provide direct marketing services should ensure that clients utilising the services respect and adhere to the Code provisions.
- 9 If ADMA becomes aware of an alleged breach of the Code by a direct marketing

organisation that is not a Member, ADMA will bring the matter to the attention of the company concerned and seek compliance.

- 10 To assist the Code Authority in enforcing the Code, Members consent to details of alleged Code breaches being disclosed by Federal and State Regulatory bodies to the Code Authority for consideration.
- 11 ADMA has periodically issued Guidelines in accordance with the Code and will issue further Guidelines from time to time.

**CONFLICT WITH LEGISLATION**

- 12 Where there is any conflict or inconsistency between the Code and any Commonwealth, State or Territory legislation regulation, that legislation or regulation shall prevail to the extent of the conflict or inconsistency. ADMA Members must comply with all Commonwealth, State or Territory legislation relating to business and direct marketing practices.

**CITATION**

- 13 This Code may be cited as the ADMA Code of Practice.

## B. Interpretations and Definitions

### 1 INTERPRETATION

References to singular include the plural and vice versa.

- 2 The Code is to be interpreted in accordance with its objectives. It is not to be read literally if that would produce a result clearly contrary to those objectives.

### DEFINITIONS

- 3 Unless otherwise indicated, in the Code these words have the following meanings:

“**ACCC**” means the Australian Competition and Consumer Commission;

“**ADMA**” means Australian Direct Marketing Association Limited (ACN 002 909 800) of Suite 1, level 5, 100 William Street, East Sydney, New South Wales 2011;

“**Australian eMarketing Code of Practice**” shall mean the Code of Practice of that name registered with the Australian Communications Authority;

“**automated dialling equipment**” shall mean any equipment capable of dialling a telephone number prior to a live operator being available to exclusively handle the call. This includes, but not limited to, predictive diallers, progressive diallers, power diallers, auto diallers, preview diallers, adaptive diallers and automatic diallers;

“**Board**” means the Board of Directors of ADMA;

“**calling line identity**” means data generated by a telecommunications network which relates to the telecommunications service of the originating call;

“**campaign**” means a course of action organised by a direct marketer and designed to induce the purchase of particular goods or services or the making of a donation;

“**charity**” means any organisation undertaking or commissioning fundraising activities for a charitable purpose;

“**continuing series of goods or services**” includes:

- (a) periodic distribution of distinct goods or services to a consumer; and
- (b) periodic distribution of goods or services to a consumer where the goods or services are not complete until the final instalment is distributed.

“**Code**” means the ADMA Code of Practice as amended from time to time in accordance with Part J of the Code;

“**Code Authority**” is the authority established by the ADMA, consisting of:

- (a) an independent Chairperson;

- (b) two consumer representatives, being persons with special competence in consumer and industry matters; and
- (c) two industry representatives, being persons of good character and repute in the direct marketing industry.

**“consent”** means express or implied consent;

**“consumer”** unless otherwise indicated, means a person acquiring goods or services:

- (a) where the price of those goods or services does not exceed \$40 000; or
- (b) where, if the price of the goods or services does exceed \$40 000, those goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption or, in the case of goods, the goods consisted of a commercial road vehicle;

and, in the case of goods, the person did not acquire the goods, or hold themselves out as acquiring the goods, for the purpose of resupply, or for the purpose of using them up or transforming them in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

Consumer also includes a prospective consumer.

**“contract solicitation”** means any form of communication, whether public or personalised, including all the elements necessary to enable the recipient to enter directly, or to offer to enter directly, into a contract that is intended to be negotiated and concluded through a means of communication at a distance.

**“direct marketer”** means any individual or organisation that engages in direct marketing and includes a telemarketer. An employee, director or agent of a direct marketer shall also be considered a “direct marketer” for the purposes of the Code;

**“direct marketing”** means the marketing of goods or services or the seeking of donations through means of communication at a distance where:

- (a) consumers are invited to respond using a means of communication at a distance; and
- (b) it is intended that the goods or services be supplied under a contract negotiated through means of communication at a distance.

**“email marketing communication”** means an electronic message containing advertising or promotional material which is sent using an Internet carriage service to an electronic address in connection with an email or instant messaging account;

**“eMarketing”** shall mean marketing messages sent by email, instant messaging or mobile wireless technology.

**“express consent”** means an active step taken by an individual to indicate consent;



“**fundraiser**” means a person, company, partnership or organisation which solicits donations from the public using a means of distance communication;

“**individual**” includes an person acting in a business or personal capacity;

“**inferred consent**” means consent that can be reasonably implied from:  
the conduct;  
business relationships; and  
other relationships  
of the individual providing consent.

“**List Warranty Register**” means the central database administered by ADMA of signed standard form undertakings of Member and non-Member organisations that personal information supplied and used for direct marketing purposes is compliant with the Privacy Act 1988 and the Spam Act 2003.

“**location-based mobile marketing message**” means a a marketing communication, sent by mobile wireless technology, that is targeted to a recipient dependent on their location as determined by technology such as Global Positioning Systems (GPS).

“**Member**” means an organisation who is a Member of ADMA;

“**minor**” the definition of ‘minor’ in any restricting legislation is to apply;

“**model code**” means the direct marketing model code of practice endorsed by the Ministerial Council of Consumer Affairs in September 2003 and any amendment or replacement of that code;

“**outbound telemarketing call**” means a telephone call initiated by a telemarketer or by an automatic dialler mechanism that is designed to induce the purchase of goods or services or the making of a donation to a charity or fundraising cause;

“**personal information**” is information or an opinion, whether true or not and whether recorded in material form or not, about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion;

“**premium rate service**” is a telephony, fax or mobile wireless technology service charged at a premium to the normally accepted standard rate for that means of communications;

“**regulator**” means any Federal or State law enforcement body;

“**restricted goods or services**” means goods or services that are, by Australian Government, State or Territory legislation, prohibited from being sold to a particular class of person;

“**statutory warranties**” includes statutory warranties and statutory conditions;

“**suppression file**” means a file, maintained by the Member or by a third party on behalf of the Member, listing recipients who have indicated that they do not wish to receive further commercial communications from the Member;

**“telemarketer”** means any individual or organisation that engages in telemarketing;

**“telemarketing”** means all activities that relate directly or indirectly to direct marketing and which involve the use of a telephone, facsimile machine, or other consumer equipment connected to a telecommunications network to contact a consumer;

“third party contact” means personal contact information provided to a direct marketer by a third party organisation, including but not limited to, referrals and swapped, rented or purchased lists.

**“third party marketer”** means any organisation or individual that carries out part or all of the direct marketing process on behalf of the direct marketer;

**“unsolicited”** means a communications sent to a recipient: (a) with whom the message originator does not have an ongoing commercial or contractual relationship; OR (b) that have not consented to the receipt of such communications.

## **C. MARKETING CLAIMS**

### **MISLEADING OR DECEPTIVE CONDUCT**

- 1 A Member shall not make misleading or deceptive claims about an offer delivered through direct marketing whether by words, omission, illustration or any other means.

### **FALSE CLAIMS**

- 2 A Member shall not:
  - 2.1 make false or misleading claims with respect to the price or quality of goods or services;
  - 2.2 quote scientific or technical data in support of a claim, unless the data can be readily substantiated;
  - 2.3 use a false or misleading testimonial;
  - 2.4 advertise courses of instruction implying the promise of employment or remuneration where this cannot be guaranteed;
  - 2.5 promise outcomes where those outcomes have no safe scientific, medical or performance basis;
  - 2.6 overstate physical security risks; and
  - 2.7 describe goods or samples as "free" unless the goods or samples are supplied at no cost or no extra cost to the consumer other than actual postage/carriage when specified.

### **MARKET RESEARCH CLAIMS**

- 3 A Member must not represent that it is undertaking market research where the purpose for contacting the individual or consumer is direct marketing.

### **MEMBER SUPPLIERS**

19

### **CONTENT OF DIRECT MARKETING COMMUNICATIONS**

- 4 Direct marketing communications must be clear and unambiguous.
- 5 Members must ensure that the content of all direct marketing communications:
  - 5.1 comply with Commonwealth law and the law of the relevant State or territory in which the recipient is domiciled;
  - 5.2 is not misleading or deceptive or likely to mislead or deceive;
  - 5.3 does not contain a misrepresentation that is likely to cause damage to the business or goodwill of a competitor;
  - 5.4 avoids discrimination on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief;

- 5.5 only uses language and content which is appropriate in the circumstances;
- 5.6 does not promote, incite or instruct in matters of crime.

**INFORMATION AT THE TIME OF OFFER**

- 6 Consumers must be provided with all information reasonably necessary for them to make an informed purchase decision.
- 7 Consumers must be provided with relevant contact information including:
  - 7.1 full company name;
  - 7.2 street address at which they can be contacted – PO Box not permitted;
  - 7.3 relevant statutory registration or licence numbers including Australian Business Number and/ or Australian Company Number;
  - 7.4 fixed line telephone number or where this is not possible, the main telephone number pertaining the Member;
  - 7.5 email address.
- 8 The consumer must be given clear, unambiguous and easily accessible information of the material terms of the offer, in anyway appropriate to the means of communication, including at least the following:
  - 8.1 the total price of the goods or services, including any delivery charge and any other fee or charge to which the consumer would be liable under the contract unless otherwise authorised by the consumer. This should indicate applicable currency.
  - 8.2 the delivery arrangements;
  - 8.3 all material restrictions, limitations or conditions to purchase including:
    - (a) a clear and complete text of the transaction's terms and conditions;
    - (b) details about any cooling-off period or right of withdrawal;
    - (c) details of any explicit warranty provisions; and
    - (d) details of any after sales service.
  - 8.4 the period, if any, for which the contract solicitation remains valid and conditions about renewal or extension.

**INFORMATION AT THE TIME OF DELIVERY**

- 9 No later than at the time of delivery, or in cases where delivery is to be effected in stages, the time of the first delivery, the consumer shall receive at least the following information in writing, in a clear and unambiguous style and in the same language as was used in the contract solicitation:
  - 9.1 the name and contact details, including at least the street address, of the organisation where consumers can make inquiries or complaints, or can return goods or cancel contracts;

- 9.2 the payment arrangements, including any credit terms, or terms for payment by instalments, and a total cash price;
  - 9.3 all restrictions, limitations or conditions of purchase;
  - 9.4 any safety or care warnings required by any applicable law to accompany the goods; or
  - 9.5 services and, where necessary, instructions for proper use; and
  - 9.6 refund, cancellation and exchange rights and procedures.
- 10 In the case of services that, by their nature, can be supplied immediately to the consumer, the information must be sent to the consumer within three days of the services commencing.

### **UNFAIR CONDUCT**

- 11 Members must not engage in conduct that is unfair or “unconscionable.” For example, a consumer’s poor spoken or written English, or an obvious inability to understand the offer must not be exploited.

### **INCENTIVES**

- 12 The terms and conditions under which incentives, rewards, prizes, or gifts, are offered including the drawing:
- 12.1 must be clearly stated, including whether distribution is conditional upon order or purchase of other goods or services; and
  - 12.2 must comply with the relevant laws of any jurisdiction in which they are offered.
- 13 A reward, prize or gift shall not be described as ‘free’ if the good or service to be purchased is increased in price or decreased in quality as a result of the premium offer.

### ***Delivery of gifts, prizes or free items***

- 14 Gifts, prizes or free items must be made available to the consumer in the period of time stated in the offer or, if no period of time is stated, within 30 days of the consumer becoming entitled to receive the gift, prize or reward.
- 15 If the gift, prize or reward is conditional on the consumer purchasing a good or service, and the Member becomes unable to deliver the good or service, the Member must still provide the consumer with the gift, prize or reward.

### ***Contests, lotteries or sweepstakes***<sup>9</sup>

- 16 A Member that intends to conduct a lottery or contest must:
- 16.1 clearly disclose, at the point of entry, the rules governing the contest or lottery, including whether the consumer’s name and address will be retained;

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<sup>9</sup> The conduct of contests lotteries or sweepstakes is also governed by separate State and Territory laws. See also ADMA’s Guidelines for Chance Draws and Prize Competition Promotions.

- 16.2 Ensure all advertised prizes are awarded as described in the rules for the contest or lottery;
- 16.3 ensure that judging takes place promptly and fairly and is certified by an independent auditor; and
- 16.4 make available the results of the contest or lottery to participating consumers who request them.

#### **PYRAMID SALES**

- 17 Members shall not operate or be involved in any kind of 'pyramid selling' or 'referral selling' scheme as defined in Div 1AAA of Part V and section 57 of the *Trade Practices Act 1974*.

#### **AVAILABILITY OF GOODS OR SERVICES**

- 18 Unless the promotional material specifically warns of limited stocks, the Member must not offer particular goods or services for sale until sufficient stock is available, or reasonably expected to be available, to meet the reasonably foreseeable demand.

#### **DELIVERY**

- 19 Members shall deliver all orders placed as the result of a contract solicitation within such time period as is clearly stated in the promotion. In the absence of any stated period, delivery must be effected within 30 days of the receipt of the order.

#### ***Delayed delivery***

- 20 When an order cannot be delivered:
  - 20.1 within the time specified in the offer;
  - 20.2 or where no time is specified, within 30 days of receipt of an order, the Member must promptly send to the consumer an initial notice acknowledging the order.
- 21 The notice must:
  - 21.1 state the date on which the order is expected to be delivered;
  - 21.2 state the reason for the delay; and
  - 21.3 offer the consumer the opportunity to cancel the order and receive a full refund of any money paid.
- 22 If the Member is not able to deliver the goods or services by the date stated in the initial notice, the Member must either:
  - 22.1 advise the consumer that it is unable to fulfil the order and refund the consumer any money paid; or
  - 22.2 notify the consumer of the new expected delivery date ("the second notice"). This notification must be accompanied by a reply-paid or other cost free response mechanism and include an option for the consumer to cancel the order and receive a full refund of any money paid.

- 23 If the Member is not able to deliver the goods or services by the date stated in the second notice, the procedure set out in the above Section C22 shall be repeated until the goods or services are delivered or the transaction has been cancelled and any monies paid refunded.

#### **CONTINUING SERIES**

- 24 Any commitment by a consumer to receive a continuing series of goods or services shall be subject to the following conditions:
- 24.1 the option to cancel this continuing series of goods or services shall be available to both parties at all times with reasonable notice (subject to the discharge of any outstanding commitment); and
- 24.2 the Member shall refund any money it has received at the time of cancellation for goods, services or postage which have not been provided.

#### **PAYMENT**

- 25 A Member must not request or accept payment for goods or services:
- 25.1 if it intends to supply goods of services materially different from the goods or services in respect of which payment is made; or
- 25.2 until the Member has possession of the goods, or the first installment of the goods, or immediate access to the services or to the first installment of the services, and there is no impediment to the Member fulfilling the order.

#### **CANCELLATION AND REFUNDS**

##### ***Cooling-off period of 7 days or more***

- 26 Each contract an Member makes with a consumer shall provide that the consumer has the right to cancel the contract within a period of time that is not less than seven business days (this excludes weekends and public holidays).
- 27 Where State, Territory or Australian Government legislation imposes a period for cancellation longer than seven working days, that longer period shall apply.
- 28 The seven business day time period shall begin:
- 28.1 for goods, on the deemed or actual date of receipt of the goods by the consumer. The consumer will be deemed to have received the goods three clear business days after the goods were dispatched, unless the consumer can prove that they were received on a later date or the Member can prove they were delivered at an earlier date;
- 28.2 for goods which are not complete or functional until the final instalment is delivered and which are distributed periodically, on receipt of the final instalment;
- 28.3 for distinct goods distributed periodically, such as magazines, on receipt of the first instalment of goods; or
- 28.4 for services, on the date the contract to supply the services is made.

- 29 A consumer may also be cancel the contract at any time before the goods or services are dispatched to the consumer, except where the goods are made-to-measure or clearly personalised and work has commenced on the making or personalisation of those goods.
- 30 The Member must ensure that the consumer's right to cancel a contract during the cooling-off period is specifically mentioned during negotiations and prominently displayed in any contractual documentation.

***When the cooling-off period does not apply***

- 31 The cooling off period need not apply to:
- 31.1 contracts for the supply of indivisible services where those services have started to be provided;
  - 31.2 any portion of services which have already been performed under a contract for the supply of divisible services;
  - 31.3 transactions concerning securities and other goods or services whose price is dependent on financial market fluctuations, which cannot be controlled by the Member;
  - 31.4 contracts for made-to-measure goods or clearly personalised goods;
  - 31.5 contracts for goods which can be immediately copied, such as books, magazines, computer software, cassettes, videos and compact discs that are supplied with or without a wrapping or seal, unless the good's immediate wrapping or seal is unbroken;
  - 31.6 contracts for personal health or hygiene goods where any wrappings or seals have been broken or tampered with; and
  - 31.7 contracts for goods which by reason of their nature cannot be returned or are liable to deteriorate rapidly.

***Method of cancelling a contract pursuant to rights during a cooling off period***

- 32 Consumers who are entitled to cancel a contract with a direct marketing organisation by exercising their cancellation rights during a cooling-off period may cancel the contract by:
- 32.1 in the case of goods, returning the goods in their original condition during the cooling-off period; or
  - 32.2 in the case of services, advising the Member during the cooling-off period of the cancellation of the contract for the supply of services.
- 33 For the purposes of subsection C32.1, goods will be considered to be in their original condition despite their packaging or swing tags having been removed or tampered with.

***Cost of returning goods***

- 34 Where a consumer exercises his or her right to cancel the contract under Section C32, the consumer shall bear the cost of returning any goods.



- 35 Where a consumer exercises his or her right to return goods because of a breach of a statutory warranty, the Member shall bear the cost of returning the goods.
- 36 Where the Member supplies a substitute good or service and a consumer exercises his or her right to cancel the contract under Section C32, the Member shall bear the cost of returning any goods.

**Option to cancel a contract for continuing series of goods or services**

- 37 A contract for the supply of a continuing series of goods or services must enable either party to cancel by giving reasonable notice.
- 38 When a party to a contract for a continuing series of goods or services cancels the contract, each party must satisfy any obligations outstanding at the time of cancellation.

**Payment of refunds**

- 39 Where a consumer is entitled to a refund, a Member must refund moneys within seven business days of the receiving the returned goods or notice of the cancellation of the contract from the consumer.
- 40 The Member has a choice whether it makes a refund by way of money or by making a credit adjustment to the consumer's credit card where:
- 40.1 a consumer claims a refund as a result of a contract cancelled during the cooling off period, or as a result of goods being defective or not fit for the purpose for which they were intended<sup>10</sup>; and
- 40.2 the consumer paid the Member by using that credit card.

**UNORDERED GOODS OR SERVICES**

- 41 Members shall not claim payment for unordered goods or services unless they have reasonable cause to believe that they are entitled to claim payment for the goods or services supplied.
- 42 Goods and services will be deemed unordered unless a consumer has taken an 'active step' to demonstrate a willingness to receive the goods or services.
- 43 Consumers who have been supplied unordered goods or services shall not have to pay for those goods or services.
- 44 Subject to Section C42, consumers who have received unordered goods shall become the owner of the goods:
- 44.1 30 days after advising the Member that the goods were not ordered and of an address where the goods can be collected; or

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<sup>10</sup> *The Trade Practices Act implies into all contracts for sale of goods or services various warranties. In relation to goods, these are that the goods are of merchantable quality (ie are not defective) and are fit for any purpose of which the consumer has been made known prior to purchase. In relation to services, these are that the services will be provided with due care and skill. Breach of these conditions entitle the consumer to cancel the contract and claim a refund.*

44.2 90 days after the receiving the goods.

whichever is the sooner, unless the Member takes possession of the goods before this time has expired.

45 During the time period referred to in Section C44 , the Member may contact the consumer to make reasonable arrangements for taking possession of the unordered goods.

46 Members are entitled to take possession of goods at any time in the following circumstances:

46.1 the goods were received by the consumer in circumstances where the consumer knew, or might reasonably be expected to have known, that the goods were not intended for the consumer; or

46.2 during the time period referred to in Section C44, the consumer unreasonably refused to permit the Member to take possession of the goods.

#### **SUBSTITUTED GOODS OR SERVICES**

47 A Member that cannot supply exactly the same good or service as specified by a consumer may supply a substitute good or service of a similar kind, quality and price provided that the possibility of this occurring has been clearly indicated at the time of offer.

48 If a Member supplies substitute goods or services to those ordered they must be of a similar kind, quality and price and the Member must clearly inform the consumer of:

48.1 their right to cancel the contract and return the goods or cancel the services; and

48.2 the time period within which the consumer may cancel the contract, which time period shall not be less than the cooling-off period.

49 When a contract for a substituted good is cancelled, the Member is responsible for the costs of returning the goods. The Member must promptly reimburse the consumer in respect of any reasonable costs incurred by the consumer in returning the goods.

#### **MINORS**

50 Members must have appropriate procedures in place to limit the sale of restricted goods or services to minors.

#### ***Collection of personal information from minors***

51 Where appropriate, a notice informing minors that parental consent is required should be given at the point at which personal information is collected. This should be clear, prominent and in a language which a minor can easily understand. It should include an explanation of the purposes for which data is collected (i.e. marketing purposes) and how consent may be give.

### **Content of commercial communications directed at minors**

- 52 Commercial communications directed at minors should not exploit their credulity, loyalty, vulnerability or lack of experience and, in particular, minors should not:
- 52.1 be made to feel inferior or unpopular for not buying the advertised product or not taking part in the particular activity;
  - 52.2 be made to feel they are lacking courage, duty or loyalty if they do not buy, or encourage others to buy a particular product or undertake a particular activity.
- 53 Commercial communications addressed to minors should not:
- 53.1 actively encourage them to coerce parents, teachers and others;
  - 53.2 exaggerate what is attainable by the ordinary minor using the product or service being advertised or promoted;
  - 53.3 exploit their susceptibility to charitable appeals and should explain the extent to which their participation will help with charity-linked promotions.
- 54 Commercial communications directed at minors should not project images of minors in hazardous situations, behaving dangerously or in close proximity to dangerous substances or equipment without direct adult supervision (for example, matches, petrol, fireworks, certain medicines and household substances, electrical appliances and machinery and agricultural equipment) and, in particular, must not encourage a minor to:
- 54.1 undertake any activity which is likely to result in their physical, mental or moral harm;
  - 54.2 enter a strange place or talk to strangers.
- 55 It should be made easy for minors to judge the size and performance characteristics of any product advertised and distinguish between real life situations and fantasy.
- 56 Where minors participate in promotions offering prizes which may raise issues between minor and parent such as, for example, holidays, pet animals, goods or cash, parental consent must be obtained prior to awarding the prize to the minor.

### **RESPONDING TO A COMPLAINT**

- 57 Members must have in place a complaint handling system (i.e. internal procedure for dealing with customer complaints) which is fair, effective, confidential and easy to use by the consumer and in compliance with Australian Standard 4269.
- 58 Members must keep an accurate record of complaints received, correspondence relating to the complaint and, where appropriate, details of remedial action taken. Records must be maintained for a minimum of six months after resolution of the complaint.
- 59 Members must have an effective in-house procedures for handling complaints and, where possible have named individual who is responsible for complaints/enquiries and who has the authority to resolve complaints and answer enquiries.
- 60 Members must acknowledge complaints promptly and normally within five working days. If the complaint is complicated and will take longer to resolve, then within this

time the recipient must be provided with details as to the likely time scale for resolving the complaint.

- 61 Members must take appropriate action to resolve complaints, such as ensuring that the goods or services have been delivered/replaced or a refund given.
- 62 Complaints involving an alleged breach of the Code, which are not resolved under a Member's internal complaints handling process, must be referred by the Member to ADMA.

## **D. FAIR CONDUCT RELEVANT TO TELEMARKETING**

### **STATUS**

- 1 Members should be aware that some States have existing or pending legislation that places obligations on organisations that supply or offer to supply goods or services via outbound telephone marketing. When undertaking an outbound telephone marketing campaign Members should contact ADMA to ensure compliance with State laws. In the event that the legislation imposes more rigorous obligations than the Code, the legislation provisions shall prevail.

### **SCOPE**

- 2 This section applies to Members making telemarketing calls to fixed line and mobile phones

### **COURTESY AND PROCEDURES**

- 3 Members must at all times be courteous and efficient during sales, marketing and service calls.
- 4 Members must avoid the use of high-pressure tactics that could be construed as harassment.
- 5 Members must always recognise the right of the other party to end the telephone conversation at any stage, and must accept any request to end the call promptly and courteously.
- 6 Members have the right to politely terminate a call at any time where, for example, the other party has become abusive or early termination of the call may avoid confrontation or confusion.

### **IDENTIFICATION INFORMATION**

- 7 At the earliest possible opportunity in an outbound telemarketing call, Members must ensure that the following information is provided to the consumer and repeated if the consumer at any time requests:
  - 7.1 the name of the person making the telephone call;
  - 7.2 where a service bureau is making the call, the name of the organisation on whose behalf the call is being made; and
  - 7.3 the purpose of the telephone call.
  - 7.4 if calling from outside Australia, the country from which they are calling.
- 8 Member bureau that carry on telemarketing on behalf of other organisations must inform the people they call of the telephone number of the organisation on whose behalf they are calling to enable those people to contact the organisation.
- 9 Members that make telemarketing calls on their own behalf or engage a bureau for that purpose, must ensure that its name, address and telephone number are listed in a telephone directory or, if a new listing, its telephone number is available through a directory assistance service.

### **Calling line identity**

- 10 When making an outbound telemarketing call, Members must not block the transmission of the calling line identity to any calling number display or any calling name display of a consumer who receives the telephone call<sup>11</sup>.
- 11 Where technically feasible, Members should ensure that when outbound calls are made from within the organisation, the number which is transmitted or displayed on receiver terminals is a telephone number which is suitable for return telephone contact by an individual.

### **INFORMATION TO BE PROVIDED ON REQUEST**

- 12 Members must ensure that the following information is provided to consumers who request such information:
  - 12.1 the name and contact details of the organisation on behalf of which the call is being made, including a telephone number and street address;
  - 12.2 the name of the person who is responsible for handling consumer inquiries which the telemarketer receives; and
  - 12.3 further details concerning the goods or services being offered;
- 13 In relation to unsolicited telemarketing calls, Members must provide, on request, details of the source from which it obtained the consumer's personal information
- 14 Members must ensure that where the information in Section D12 and D13 above cannot be provided at the time of the request, it will be provided to the consumer within a reasonable period after the request is made and in all instances within 30 days of the request.

### **GUISE OF RESEARCH**

- 15 Where the purpose of the call is to sell a good or service, telemarketers must not represent that they are undertaking market research.

### **COLLECTION OF PERSONAL DATA**

- 16 Where during the course of a telemarketing call Members collect personal information from or relating to an individual, the Member must comply with the requirements of Section G of this Code.

### **ACCEPTABLE CALLING CONDUCT**

- 17 If it appears that a consumer has been interrupted at an inconvenient time by a telephone call, the telemarketer must promptly offer to call the consumer back and inquire as to when would be a more convenient time to do so.
- 18 Where the consumer requests not to receive any future telemarketing calls, Members must comply with Part H of this Code of Practice.

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<sup>11</sup> *When the outbound call is made by a service bureau on behalf of another organisation, calling line identity blocking may be used provided that the consumer is given a telephone number for the organisation. Guidelines for organisations using CND information have been developed by the Australian Communications Industry Forum in consultation with ADMA.*

- 19 A telemarketer must provide the consumer with a clear opportunity to accept or decline the organisation's offer.

#### **PERMITTED CALLING TIMES**

- 20 Without a consumer's consent, a telemarketer shall not make an outbound telephone or Automatic Calling Equipment call to contact a consumer before 9 am or after 8 pm local time at the consumer's location or on Sundays and the following public holidays:

New Years Day  
Australia Day  
Good Friday;  
Easter Monday;  
Anzac Day  
Christmas Day  
Boxing Day (26<sup>th</sup> December)

- 21 unless permitted by Federal or State legislation  
If the consumer has previously agreed to receive a telemarketing call from the organisation outside of these hours or on these public holidays then the organisation may make such a call to that consumer.
- 22 Some States have further restrictions on calling hours. Members must consult the relevant regulation in the States into which they are calling.

#### **LINE DISCONNECTION TIMES**

- 23 Members making telemarketing calls must ensure that the consumer's telephone line is released within five seconds of the consumer hanging up or otherwise indicating that he or she requires the telemarketer to release the telephone line.

#### **CALLING FREQUENCY**

- 24 Members making telemarketing calls must not contact a consumer more than once in any 30-day period for the same or similar campaign without that consumer's prior consent.

#### **ANSWERING MACHINES**

- 25 Where, as a result of a telemarketing call, a Member leaves a message on an consumer's answering machine, the message must include:
- 25.1 the name and contact details of the organisation on behalf of which the call is being made,
- 25.2 a fixed line telephone number, that is not charged at more than standard national rate, through which the individual can during normal business hours speak to a live operator
- 26 Members should endeavour not to leave messages on mobile phones or other other answering services where it is known there is a charge for retrieval.

#### **RANDOM AND SEQUENTIAL DIALLING EQUIPMENT**

- 27 Members must not use random or sequential dialling equipment to generate telemarketing calls

## **AUTOMATED DIALLING EQUIPMENT**

28 For the purposes of this Code:

a "connected call" is a call where an operator is connected to a live individual.  
a "live call" is a call that has been answered by a live individual but not connected to a live operator  
an "abandoned call" is any call where the dialling equipment releases the line after the call has been answered by a live individual. A call that terminates due to a network error is not, for the purposes of this Code, considered an abandoned call.

29 Members must ensure their dialling equipment is adjusted to ensure a minimum ring time of 15 seconds before the call is discontinued as unanswered.

30 If a live operator is unavailable to take a connected call, the equipment should abandon the call and release the line as quickly as possible and within a maximum of 2 seconds from when the line is picked up.

31 The dialling equipment must at all times be adjusted to ensure that the rate of calls abandoned is no more than 5% of connected calls on each individual campaign over any given 24 hour period.

32 Where a number has received an abandoned call, any further calls to that number within the next 72-hour period must be handled by a dedicated operator.

33 For each individual campaign, Members must maintain an up to date archive of dialler statistics, which clearly demonstrate compliance with Sections D28 to D32 of this Code. This must include a daily summary of:

33.1 The number of calls attempted;

33.2 The number of live calls

33.3 The number of connected calls;

33.4 The number of calls passed to a live operator;

33.5 The number of live calls abandoned by the dialling equipment.

34 Records of dialler statistics must be retained for a minimum of 12 months and must be available for inspection on reasonable notice from ADMA and other appropriate authorities.

## **PROGRAMMED VOICE CALLING SYSTEMS**

35 Members intending to initiate outbound marketing calls involving the use of an programmed voice calling system (i.e. a system which, when activated, operates to make calls without human intervention leaving a recorded message for the recipient) must have obtained the prior express or inferred consent of the person being called, whether they are a consumer, individual or another business.

## **CALL RECORDING**

36 Members must ensure that they comply with the relevant Federal and State legislation when recording a telephone marketing or sales call.

37 Where a call recording:

37.1 is likely to include personal information relating to the individual; or



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37.2 is intended to be relied upon for contractual or other evidential purposes

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Members must take all necessary steps to ensure the individual is informed the call is to be recorded prior to the recording taking place.

38 Members must ensure that call recordings containing personal information relating to the individual are used, maintained and stored in accordance with the Privacy Act 1988 including the National Privacy Principles (NPPs)

## **E. FAIR CONDUCT RELEVANT TO EMAIL MARKETING AND ELECTRONIC COMMERCE**

### **EMAIL MARKETING**

- 1 Members that:
  - 1.1 use email as their sole or principle means of marketing, advertising or promoting their own goods and services; or
  - 1.2 under contract, agency or other arrangement provide services that assist other organisations in sending marketing, advertising or promotional emailsmust comply with the Australian eMarketing Code of Practice
- 2 Members that are not covered by Section E1.1 or E1.2 above must comply with the Spam Act 2003 when sending marketing, advertising or promotional emails.

### **TRANSACTIONING ONLINE**

- 3 In addition to the requirements of Section E1 of the Code, Members engaged in electronic commerce should provide sufficient information about the terms, conditions and costs associated with the electronic transaction to enable consumers to make an informed decision about whether to enter into the transaction.
- 4 Where, in the process of transacting online Members collect personal information from or relating to an individual, Members must ensure compliance with Section G of the Code.
- 5 Such information should be clear, accurate, easily accessible and provided in a manner that gives consumers an adequate opportunity for review before entering into the transaction.
- 6 Where more than one language is available to conduct a transaction, Members should make available in those same languages all information necessary for consumers to make an informed decision about the transaction.
- 7 Members should provide consumers with a clear and full text of the relevant terms and conditions of the transaction in a manner that makes it possible for consumers to access and maintain an adequate record of such information.
- 8 Where applicable and appropriate given the transaction, such information should include the following:
  - 8.1 an itemisation of total costs collected and/or imposed by the business;
  - 8.2 notice of the existence of routinely applicable costs to the consumer that are not collected and/or imposed by the business;
  - 8.3 terms of delivery or performance;
  - 8.4 terms, conditions and methods of payment;
  - 8.5 restrictions, limitations or conditions of purchase, such as parental/guardian approval requirements, geographic or time restrictions;

- 8.6 instructions for proper use including safety and health care warnings;
  - 8.7 information relating to available after-sales service;
  - 8.8 details of conditions related to withdrawal, termination, return, exchange, cancellation and/or refund policy information; and
  - 8.9 available warranties and guarantees.
- 9 All information that refers to costs should indicate the applicable currency.
- 10 When transacting cross-border, Members should be aware of, and where appropriate take account of, the national laws and Codes of Practice of the country in which the recipient is domiciled.

### **CONFIRMATION PROCESS**

- 11 To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase,
- 11.1 to identify precisely the goods or services he or she wishes to purchase;
  - 11.2 identify and correct any errors or modify the order;
  - 11.3 express an informed and deliberate consent to the purchase; and
  - 11.4 retain a complete and accurate record of the transaction.
- 12 The consumer should be able to cancel the transaction before concluding the purchase.

### **PAYMENT**

- 13 Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.
- 14 Members should take steps to limit liability for unauthorised or fraudulent use of payment systems.

### **DISPUTE RESOLUTION AND REDRESS**

#### ***Applicable Law and Jurisdiction***

- 15 Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction.

#### ***Alternative dispute resolution and redress***

- 16 Consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden.

## **F. FAIR CONDUCT RELEVANT TO MOBILE MARKETING**

### **SCOPE**

- 1 This Section applies to Members involved in marketing via mobile wireless technology (mobile marketing). This encompasses existing and emerging wireless technologies including but not limited to Short Message Service (SMS), Multimedia Message Service (MMS), Wireless Access Protocol (WAP) and 3<sup>rd</sup> Generation technology (3G)

### **INTERPRETATION**

- 2 For the purposes of this section the following definitions apply:
- 2.1 Location Based Services Commercial communications targeted to an recipient dependant on their location
- 2.2 Message Originator Any company (including sole traders, partnerships, charities Government and political parties) which initiates a commercial communication to promote or supply its products or services.
- A network provider will only be defined as a message originator when sending his or her own commercial communications.
- 2.3 Recipient Any natural or legal person who receives a commercial communication.

### **MOBILE MARKETING**

- 3 Members that:
- 3.1 use mobile marketing as their sole or principle means of marketing, advertising or promoting their own goods and services; or
- 3.1 under a contract, agency or other arrangement provide services that assist other organisations in sending mobile marketing messages
- must comply with the Australian eMarketing Code of Practice
- 4 Members that are not covered by Section F3.1 or F3.2 above must comply with the Spam Act 2003 when sending mobile marketing.

### **LOCATION BASED MOBILE MARKETING**

- 5 Members must only send location-based mobile marketing messages to Recipients that have given Express Consent to the receipt of such communications.

### **SUBSCRIPTION SERVICES**

- 6 When offering subscription services that are not charged at a premium rate, Members must clearly define the service offered.

- 7 Supply of subscription services may only commence subsequent to the message originator providing the individual with an opportunity to see or hear the terms and conditions relating to the subscription service, including:
  - 7.1 The cost per unit or the total cost of subscribing (inclusive of GST);
  - 7.2 the term of the subscription;
  - 7.3 the frequency of the subscription;
  - 7.4 payment intervals.
- 8 Express consent of the individual must be obtained by the message originator before supplying subscription services.
- 9 The message originator must obtain further express consent from the individual prior to supplying additional or separate services at a subsequent date.

**PREMIUM RATE**

- 10 Members must ensure that the marketing and supply of premium rate mobile services complies with the Telephone Information Services Standards Council (TISSC) Code of Practice.

## **G. FAIR CONDUCT RELEVANT TO CONSUMER DATA PROTECTION**

### **COMPLIANCE WITH THE PRIVACY ACT 1988**

- 1 Members that collect, use, store or disclose personal information for direct marketing purposes must comply with the National Privacy Principles (NPPs) as specified in the *Privacy Act 1988*. These include:

- NPP 1 – Collection
- NPP 2 – Use and disclosure
- NPP 3 – Data quality
- NPP 4 – Data security
- NPP 5 – Openness
- NPP 6 - Access and correction
- NPP 7 – Identifiers
- NPP 8 – Anonymity
- NPP 9 – Transborder data flows
- NPP 10 – Sensitive information

### **USE OF THIRD PARTY CONTACTS FOR DIRECT MARKETING PURPOSES**

- 2 Members must only use third party contacts for marketing purposes if:
  - 2.1 The personal information supplied forms part of or is extracted from a database that is currently registered with the ADMA List Warranty Register; or
  - 2.2 Confirmation has been received in material form (i.e. in a contract or other documented format) that the data supplied has been collected and disclosed in accordance with the Privacy Act 1988 including the NPPs.
- 3 In addition to Section G2 above, Members using email addresses or mobile phone numbers supplied by a third party for eMarketing purposes must ensure compliance with Section D4 of the Australian eMarketing Code of Practice

### **SUPPLY OF PERSONAL INFORMATION BY THIRD PARTY DATA SUPPLIERS**

- 4 For the purposes of this section, 'supply' shall mean the sale, rental, swapping or brokering of third party contacts between organisations, whether or not for financial gain.
- 5 Members must not supply, promote, advertise or offer to supply third party contacts for direct marketing purposes unless
  - 5.1 the personal information forms part of or is extracted from a database that is currently registered with the ADMA List Warranty Register
  - 5.2 the Member supplying, promoting, advertising or offering to supply the personal information is also the data owner and can demonstrate the personal information has been collected and will be disclosed in accordance with the NPPs.

- 5.3 the Member supplying, promoting, advertising or offering to supply the personal information is not the data owner but has received confirmation in material form from the data owner that the personal information has been collected and will be disclosed in accordance with the NPPs.
- 6 In addition to Section G5 above, Members must not supply, promote, advertise or offer to supply third party email and mobile phone contacts for eMarketing purposes unless:
  - 6.1 the personal information forms part of or is extracted from a database that is currently registered with the ADMA List Warranty Register
  - 6.2 the Member supplying, promoting, advertising or offering to supply the personal information is also the data owner and can demonstrate that the email and mobile contacts have given express or inferred consent to have their details disclosed to and used by a third party.
  - 6.3 the Member supplying, promoting, advertising or offering to supply the personal information is **not** the data owner but has received confirmation in material form from the data owner that the email and mobile contacts have given express or inferred consent to have their details disclosed to and used by a third party.

## **H. RESPECTING CONSUMER PREFERENCE**

### **SUPPRESSION LISTS**

- 1 Members sending marketing communications must operate and maintain a suppression file, listing recipients who have indicated they do not wish to receive further marketing communications.
- 2 Members must not use the ADMA 'Do Not Contact' services as an alternative to the suppression file required by Section H1 above
- 3 Where an individual requests not to receive marketing communications, Members must, as soon as possible, suppress the recipient's data from their marketing database. In all cases, the request must be complied with within:
  - (a) 45 days of receipt of a request to cease using data for direct mail, telephone marketing or fax marketing
  - (b) 5 days from the individual sending the request to cease using the data for eMarketing purposes
- 4 Where the suppression cannot take immediate effect, Members should inform recipients of this fact and explain they may receive further marketing communications for a maximum additional period of seven days whilst the request is processed.
- 5 Where a third party service provider receives a request from an individual not to receive marketing communications, the third party service provider must forward the request to the organisation expeditiously, thereby enabling the organisation to fulfil his obligations under Section H3.
- 6 Members must use the Do Not Mail/Do Not Call/ Do Not Email and Mobile Marketing Opt-Out Services of ADMA when conducting a direct marketing campaign in order to remove the name of any consumer, other than a current customer, who has requested that they not receive direct marketing offers.
- 7 For the purposes of this clause a "current consumer" is any consumer who has requested information or made a purchase within the last six months or during a normal selling cycle.
- 8 Members must remove or suppress a consumer's name from all lists for transfer to a third party at the request of the consumer.

### **SOURCE OF PERSONAL INFORMATION**

- 9 Members must inform a consumer, on request, of the source of the individual's personal information.

### **ADMA 'DO NOT CONTACT' SERVICES**

- 10 ADMA will offer a 'Do Not Mail' and a 'Do Not Call' Opt-Out Service and Members agree to act in accordance with that service to the extent that it relates to them:
  - 10.1 consumers will be offered the opportunity to inform ADMA via postage-paid



reply mail and ADMA's web site that they do not wish to receive marketing communications from ADMA Members (a 1-300 number will provide information on how to register for the service);

- 10.2 ADMA will register the name of consumers exercising this preference ('Do Not Mail' and 'Do Not Call' Services);
- 10.3 the registry will be made available by ADMA to Members in electronic format;
- 10.4 within a reasonable time from the date on which the Member receives the Do Not Mail and Do Not Call service files, the Member must use them to suppress the names of these consumers, unless they happen to be current customers of the Member;

## **I. ENFORCEMENT**

- 1 The scope of ADMA's enforcement procedures is limited to alleged breaches of the Code. It does not extend to:
  - 1.1 mediation of consumer complaints, which do not involve an alleged breach of the Code and would normally be dealt with by a Member's internal complaints handling process; and
  - 1.2 contractual disputes between suppliers and users of direct marketing services.

### **COMPLAINT RECEIVED BY ADMA**

- 2 Any regulator, individual or consumer who considers that an Member has breached a provision of the Code may lodge a complaint with ADMA, addressed as follows:

Code Compliance Officer  
Australian Direct Marketing Association  
P.O. Box 464  
Kings Cross  
New South Wales 1340

- 3 The complainant should set out the following details:
  - 3.1 his or her name and contact details;
  - 3.2 the name and, if known, the contact details of the Member;
  - 3.3 a brief outline of the complaint; and
  - 3.4 if the complainant has previously made a complaint to the Member, a brief outline of how that complaint was dealt with by the Member.

### **COMPLAINT INITIATED BY CODE AUTHORITY**

- 4 The Code Authority may instigate investigation without receipt of a written complaint where it has reason to believe that a Member company is acting in breach of the Code of Practice provisions.

## **RESPONDING TO COMPLAINTS RELATED TO ALLEGED BREACH OF THE CODE**

### ***No breach of the Code***

- 5 If, after assessing a complaint, the Code compliance officer does not consider there has been a breach of the Code, the Code compliance officer shall write to the complainant informing him or her that, based on the information provided by the complainant, there does not appear to be a breach of the Code;
  - 5.1 if new information becomes available, the complainant may request that ADMA review the complaint again;
  - 5.2 the complainant may request a review of the decision of the Code compliance officer by the Code Authority; and

- 5.3 the response of ADMA does not preclude the complainant from pursuing other forms of redress such as lodging his or her complaint with a government regulatory authority.
- 6 Upon receiving a request for a review of a decision that the complaint does not involve a breach of the Code, the Code compliance officer must refer the matter to the Code Authority for its review in accordance with Section I 12.

***Lack of jurisdiction***

- 7 If, after assessing a complaint, the Code compliance officer concludes that:
- 7.1 the complaint does not fall within the scope of the Code of Practice; or
- 7.2 the complaint does not fall within the jurisdiction of the Code Authority and should be dealt with by a Government Regulatory body,
- the Code Compliance Officer shall endeavour to direct the complainant to the appropriate regulatory or advisory body.

***Potential breach of Code by non-Members***

- 8 Where the Code compliance officer considers that an organisation who is not a Member of ADMA may have breached the Code, the Code compliance officer may write to the non-Member informing them of the existence of the Code and request compliance. The compliance officer may forward the complaint to the appropriate regulatory authority for further action.

***Potential breach of the Code by Member***

- 9 Where the Code compliance officer considers that an ADMA MMember may have breached the Code, the officer shall write to the ADMA MMember outlining the particulars of the alleged misconduct. Members must provide a written response to the allegations within 14 days.
- 10 If within 14 days the ADMA Member provides clear evidence of acting in compliance with the Code or independently resolves the complaint, the Code compliance officer will take no further action and advise the complainant in writing why no further action will be taken, offering the complainant the option of requesting that the Code Authority review the complaint.
- 11 If the ADMA Member disputes the complaint they must show evidence of steps undertaken in the matter to comply with the Code. If the Member is not able to demonstrate compliance within a reasonable period of time, the Code compliance officer shall refer the complaint to the Code Authority for its consideration in accordance with Section I 12.
- 12 Upon reviewing the complaint, the Code Authority may:
- 12.1 direct the Code compliance officer to investigate the complaint further and report the results of such investigation to the Code Authority;
- 12.2 cause the Code compliance officer to send a notice to the ADMA Member inviting the organisation to attend a hearing regarding the alleged breach of the Code by the Member. The notice should stipulate the place, the day and hour of the hearing and offer the ADMA Member the opportunity to attend the hearings by way of telephone conference; or

resolve not to further pursue the alleged breach.

### ***Hearing before the Authority***

- 13 Prior to or at the Code Authority hearing, the Member may make written submissions to the Code Authority. Prior to the Code Authority hearing, the Member must be given a reasonable opportunity to inspect any documents that the Code Authority proposes to have regard to in reaching its decision on the allegations.
- 14 At the Code Authority hearing, the Member shall be given a reasonable opportunity to present its case. The Member may make verbal submissions in relation to the allegations. The Member may appear in person or may be represented by some other person. The Code Authority may, at its discretion, invite a complainant to participate in the Code Authority's hearings through written and/or verbal submissions.
- 15 Within 14 days of the conclusion of the Code Authority hearing, the Chief Executive Officer shall send the Member a notice containing the decision of the Code Authority. If the decision affirms the allegations, then the notice shall also include any remedial action and/or sanctions the Code Authority considers appropriate. The Code Authority must advise the complainant in writing of the decision of the Code Authority in relation to his or her complaint and provide a statement of any reasons the Code Authority has for making that decision.
- 16 The Member will have 14 days from receipt of the decision of the Code Authority to take the necessary steps to comply with the decision.
- 17 If within 14 days from receipt of the decision of the Code Authority the Member is unable to demonstrate compliance with the decision, the CEO will call a special meeting of the Board of Directors to consider removing the Member from the Association, subject to the recommendation of the Code Authority.
- 18 If ADMA records indicate that the Member has breached the Code on two or more occasions in the preceding 12 months, the Code Authority may recommend to the CEO that ADMA Membership be revoked.
- 19 If the Member withdraws from ADMA Membership at any point:
  - 19.1 during the consideration of a complaint by the Code Authority; or
  - 19.2 subsequent to a determination being reached by the Code Authority rendering sanctions unenforceable;

the Code Authority forward the complaint, including relevant documentation and the determination, to the appropriate regulatory authority for further action.

### ***Sanctions for Breach***

- 20 Where the Code Authority finds that a Member has been in breach of the Code it may, subject to Section I 21, impose such sanctions as it considers appropriate including, without limiting the generality of its powers:
  - 20.1 requiring a formal apology for breach;
  - 20.2 requiring corrective advertising or the withdrawal of offending advertisements

- or statements;
- 20.3 requiring the correction or deletion of relevant records and personal information;
  - 20.4 recommending refund or replacement of goods or services where appropriate;
  - 20.5 requiring the Member to take specified remedial action to correct the breach and avoid re-occurrence;
  - 20.6 seeking a written undertaking from the Member that the breach will not be repeated;
  - 20.7 recommending the relevant supply chain or media channel used by the Member to communicate with its customers cease to supply and not cooperate with the Member in respect of future direct marketing activities planned by the Member until the breach is rectified;
  - 20.8 recommending to the CEO that Membership be suspended or revoked.
- 21 The ADMA Board of Directors may, on recommendation of the Code Authority, impose the following sanctions:
- 21.1 order the payment of money, the transfer of property (including goods) or the delivery of goods;
  - 21.2 suspend or cancel Membership of a Member; or
  - 21.3 issue a formal written admonishment to the non-compliant Member, which may, where appropriate, be made public. This will include specifically informing the Membership that action has been taken. The non-compliant Member will be given the opportunity to both see and comment on the statement prior to publication;
- 22 During suspension or after termination, the Member must take immediate steps to cease using the ADMA logo and must not imply in any way that it is a Member of the Association.
- 23 On suspension or termination, the ADMA Board of Directors may notify any relevant industry bodies and/ or issue a public statement giving reasons for the suspension or expulsion.

***Non-Members***

- 24 With regard to non-compliance by non-Members, ADMA will inform the relevant government regulator of the non-compliant behaviour.

***Charges***

- 25 No fees or charges will be levied by ADMA with respect to the enforcement procedures under this Part I. Complainants must bear their own costs with respect to making a complaint under this Code.

***Publication of Enforcement Action***

26 ADMA will publish in its Annual Report:

- 26.1 the number of the complaints received by the Code compliance officer during that year;
- 26.2 the number of breaches established by the Code compliance officer and Code Authority during that year;
- 26.3 an analysis of the enforcement action taken during that year;
- 26.4 a statistical analysis of complaints by company.

## **J. CODE REVIEW AND AMENDMENT**

### **REVIEW**

- 1 The Code shall be subject to independent review on a regular basis, with the review body (not being the Code Authority) to consist of an independent chair and equal number of industry and consumer/community representatives.
  - 1.1 In conducting its review, the review body should, where appropriate, consult with groups affected by the Code.
  - 1.2 The review shall be presented to the Board.

### **AMENDMENT**

- 2 The Board may at any time resolve to amend the Code.
- 3 Once an amendment of the Code has been made by the Board, the Board will ensure that:
  - 3.1 each Member of ADMA promptly receives notice of the amendment; and
  - 3.2 the amendment is adequately publicised so that consumers and organisations that are not Members of ADMA may be made aware of the amendment.

## **Attachment 2**

### **Submissions received from interested parties prior to 2004 Code amendments**

As noted by the draft determination, the ACCC sought submissions from a wide range of interested parties when the application for revocation and substitution was initially lodged in respect of the original ADMA code.

Submissions were received from the following interested parties:

- Council of Small Business Organisations of Australia Ltd
- Australian Capital Territory Department of Justice and Community Safety
- Attorney-General's Department
- Office of the Federal Privacy Commissioner
- South Australian Office of Consumer and Business Affairs
- New South Wales Office of Fair Trading
- Office of the Federal Privacy Commissioner
- Queensland Government, Department of Tourism, Racing and Fair Trading
- Consumers' Federation of Australia
- Financial Services Consumer Policy Centre
- Consumer Credit Legal Centre (NSW) Inc
- Robin Whittle – First Principles
- Consumer Affairs Victoria
- Australian Consumers' Association
- Consumer Law Centre Victoria



## **Summary of interested party submissions**

An outline of the key issues raised in submissions is provided below. Full copies of public submissions are available from the ACCC's public register.

### *Anti-competitive detriments*

A2.1 The Financial Service Consumer Policy Centre (FSCPC) and the Consumer Law Centre Victoria raised the following issues in respect of the anti-competitive aspects of the ADMA Code:

- some ADMA members refuse to deal (eg through procurement contracts) with non-ADMA members;
- some third parties prefer to deal only with ADMA members;
- there are some alleged reputational advantages of belonging to ADMA;
- there are general benefits of belonging to an industry association with a high profile for political lobbying; and
- there are some qualification and training packages and education initiatives linked exclusively to ADMA membership.

FSCPC submitted that because of these matters, non-membership of ADMA may place a direct marketing company at a commercial disadvantage.

A2.2 The FSCPC submitted that there is some evidence that Code compliance and membership of ADMA do represent a burden for direct marketers, for example:

- there is some evidence that Code compliance has required expenditure on 'self-audits' and evaluation;
- there is some evidence that Code compliance has required upgrading CRM software or call centre/e-commerce hardware;
- ADMA membership requires payment of a joining fee (\$165) and an annual fee based on revenue (\$1,089 - \$16,500); and
- access to ADMA's do not call/do not mail lists (now available for third party access) also attracts fees. These fees are set collectively by the ADMA board, and a substantial (75%) discount is provided to ADMA members.

A2.3 The ACT Department of Justice and Community Safety (DJCS) noted that the focus of the ADMA Code appears to be on promoting good consumer relations between consumers and ADMA members, rather than preventing competition between industry participants.

- A2.4 DJCS submitted that while the ADMA Code does have the potential to result in a level of anti-competitive conduct by removing the impetus for achieving higher standards in customer relations, the benefits that flow may outweigh the detriments.
- A2.5 Consumer Affairs Victoria submitted that, on the basis of ADMA's claim to have approximately 500 members and represent 80% of the value of direct marketing turnover in Australia, 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. Consumer Affairs Victoria further stated that 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.
- A2.6 The Australian Consumers' Association (ACA) submitted that as the Code is ineffectual and lightly enforced, the anti-competitive strength of the Code is weak and insufficient to require authorisation.

*Public benefits*

- A2.7 Concerns were raised that since the original authorisation the ADMA Code has not resulted in any real benefit to consumers.
- A2.8 Consumer Affairs Victoria submitted that it 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. Consumer Affairs Victoria is concerned that ADMA's Code does not go far enough to protect consumers from intrusive and unfair practices by direct marketers. Consumer Affairs Victoria suggested that, should authorisation be granted, it should 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.

Furthermore, Consumer Affairs Victoria suggested that ADMA should be asked to address improved administration of its Code, including a stronger emphasis on enforcement of the Code, monitoring outcomes and improving awareness of the Code among consumers.

- A2.9 DJCS submitted that benefits which flow from the Code include increased confidence in the direct marketing industry, access to dispute handling

mechanisms, the application of sanctions against ADMA members who infringe against the Code and consumer representation on the Code Authority.

A2.10 The Consumers' Federation of Australia (CFA) submitted that to achieve any public benefit, a Code must at a minimum:

- have broad industry coverage;
- be effectively monitored and enforced; and
- raise industry standards above those generally provided for in legislation.

The CFA considered that the ADMA Code fails at least on the last two points.

*Effectiveness / industry coverage*

A2.11 Concerns were raised as to ADMA's limited membership in the direct marketing industry. The FSCPC stated that public benefit can only be achieved by a Code which covers a significant portion of the industry. In particular, the provisions relating to telemarketing and spam can only deliver a public benefit if ADMA's membership includes a significant portion of the industry which conducts telemarketing and spam campaigns. The FSCPC expressed that it doubted that ADMA has significant industry coverage in outbound telemarketing and spam and noted that there are numerous other industry associations which specifically cover aspects of direct marketing, including telemarketing and spam.<sup>12</sup> The FSCPC estimated that ADMA members would account for less than 10% of outbound telemarketing calls and less than 1% of spam in Australia. It was further submitted that there are a number of major list brokers who are not ADMA members.

A2.12 The CFA submitted that it appears that many organisations that cause problems for consumers are not ADMA members. The FSCPC also submitted that small business does not appear to be well represented in ADMA's membership.

A2.13 The South Australian Office of Consumer and Business Affairs (OCBA) submitted that it is keen to see further Code amendments that are directly related to ADMA's ability to measure and report on the effectiveness of the Code. OCBA requests that the Code is amended to require direct marketers to gather data from the community as to the level of satisfaction with direct marketing and direct marketers and that this information will then provide a basis upon which the success of the Code can be assessed and the need for greater, or lesser, regulation can be determined.

A2.14 Robin Whittle considers that ADMA is not the key representative body in outbound telemarketing and submits that some members of ADMA are suppliers of

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<sup>12</sup> For example, Direct Sellers Association of Australia, Australian Teleservices Association, Market Research Society of Australia, Association of Market Research Organisation, Internet Industry Association and Fundraising Institute of Australia.

goods and services to direct marketers, rather than marketers or list providers themselves, such as printers, envelope manufacturers and legal and staff recruitment firms. Robin Whittle noted that these firms have no marketing activities so their membership involves no regulatory restrictions on their business activities.

- A2.15 Consumer Affairs Victoria submitted that 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. Consumer Affairs Victoria further submitted that as a result it is significantly open to interpretation, thereby reducing its effectiveness as a means to prescribe higher business standards to members.
- A2.16 Interested parties further submitted that the most unscrupulous operators in the direct marketing industry are unlikely to be members of ADMA.

#### *Enforcement & monitoring*

- A2.17 Concerns were raised in respect of the weakness of the Code in practice, specifically in respect of whether ADMA actively enforces the Code and the extent to which ADMA is independent in its auditing and monitoring of the effectiveness of the Code.
- A2.18 DJCS submitted that the ADMA Code should be appropriately enforced in order to ensure that the protection provided to consumers by the ADMA Code is not illusory. DJCS suggested that it may be appropriate to include a condition in the authorisation to the effect that ADMA must make publicly available on its website de-identified data and statistics on its dispute resolution activities and the imposition of sanctions against ADMA members who breach the Code. DJCS submitted that making this type of information freely available would assist in determining the effectiveness of the Code as an instrument of consumer protection and would allow an accurate measure of the consumer benefit provided by the ADMA Code.
- A2.19 It was noted by DJCS that ADMA has not provided any information about whether its power to expel a member have ever been exercised. It was noted by the FSCPC that one ADMA member cancelled its membership of ADMA after the ADMA Code Authority decided to pursue compliance related sanctions, and that no further action against the company was possible. It was noted by interested parties that the member in question is still in business and rents out its list of 160,000 customers for other direct marketing campaigns.
- A2.20 The CFA stated that enforcement of the Code by ADMA is ineffective in part due to the low number of complaints received by ADMA and the ability of companies to resign from ADMA if they don't like ADMA's decision.
- A2.21 Consumer Affairs Victoria submitted that the Code fails to establish a regime whereby the conduct of direct marketers is being rigorously monitored to ensure business standards are being adhered to.

A2.22 Consumer Affairs Victoria suggested that independent auditing reports and opinion surveys be undertaken to indicate the level of consumer awareness of the ADMA Code and where to lodge complaints against direct marketers.

*Independence of the Code Authority*

A2.23 Concerns were also expressed in respect of the independence of the Code Authority. Robin Whittle submitted that the Code Authority is a private function within ADMA and that there is no public disclosure of matters which are related to the independence of the Code Authority members such as how they are selected; what they are paid; the length of nature of the contracts they are on; non-disclosure agreements regarding their interaction with ADMA and its members; and no minutes of meetings or public disclosure of communication between the Code Authority and ADMA.

*Lack of consumer awareness*

A2.24 The FSCPC noted that ADMA is only receiving 30 to 40 complaints each year and that no other consumer Code in recent Australian experience has been the subject of fewer complaints or managed to achieve such a low profile with members of the public. The FSCPC noted that there is evidence that direct marketing continues to be the subject of a large number of complaints to other regulatory agencies.

A2.25 The FSCPC submitted that the low level of complaints under the Code can be explained by the following:

- members of the public are not aware of the Code;
- the majority of direct marketing complaints (most of which relate to telemarketing and spam) concern organisations who are not members of ADMA;
- the Code does not actually prohibit the major type of conduct which aggravates consumers (being called at home during dinner-time or receiving hundreds of spam emails – both of which are permitted under the Code);
- members of the public do not trust the industry to regulate itself and are looking for more independent regulators;
- members of the public can see no benefit in making complaints under the Code because no compensation is available; and
- members of the public can see no benefit in making a complaint under the Code because it lacks enforcement (when compared to legislation).

A2.26 DJCS also submitted that the low level of complaints received by ADMA may reflect a lack of consumer awareness of where to go to lodge a complaint rather

than an indication that the market is performing well or that industry members are complying closely with the ADMA Code.

- A2.27 It was noted by DJCS that various State Privacy Commissioners are receiving a significant number of complaints about the practices of direct marketing industry participants which might indicate that there is a large number of consumers who are unaware of ADMA's existence and where a complaint can be lodged.
- A2.28 The Office of the Federal Privacy Commissioner (OFPC) also submitted that it is not clear in the ADMA Code that a consumer can make a privacy related complaint to the OFPC. OFPC submitted that it is concerned if the Code represents, or is seen as representing, the Code Adjudicator as the only body able to deal with complaints about privacy. OFPC stated that the Privacy Commissioner's role in complaints handing on privacy matters should be clearly stated and explained within the Code.
- A2.29 OCBA suggested that ADMA members should announce that they are adherents to the Code at each point of consumer contact. OCBA considered that this may stimulate interest in the Code and facilitate assessment of its effect on consumers.
- A2.30 The CFA submitted that a reasonable level of complaints is usually required in order to adequately monitor a Code. The CFA stated that it considers that the small number of complaints is due to the lack of awareness of the ADMA Code rather than lack of consumer concerns.

#### *Perception of direct marketing industry*

- A2.31 The FSCPC submitted that some aspects of direct marketing are extremely unpopular and unacceptable with members of the public, particularly door to door sales, telemarketing and spam.
- A2.32 The FSCPC noted the Industry Taskforce on Self Regulation report which stated:<sup>13</sup>

“Direct marketing techniques pose a much greater threat to personal privacy and data privacy than does advertising since direct marketing techniques can be much more intrusive than advertising. While it is easy to ignore radio and television advertising, it is much more difficult to ignore telemarketing, direct mail or email. In addition, some consumers are much more vulnerable to direct marketing techniques than others and can be coerced into purchasing goods and services they would otherwise not have purchased. For example, poorly educated individuals, migrants and the aged can be targeted by unscrupulous firms using high pressure direct selling techniques.”

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<sup>13</sup> <http://www.selfregulation.gov.au/publications/TaskForceOnIndustrySelf-Regulation/ConsultantReport/ch4.rtf> as sourced from FSCPC submission 12 September 2003.

A2.33 The Consumer Credit Legal Centre (NSW) Inc stated that the vulnerability of consumers in their own home is well established and recognised in various legislative instruments such as the various Door-to-Door Sales Acts and provisions in Fair Trading Acts or equivalent.

A2.34 Robin Whittle submitted that problems caused by telemarketing are primarily due to repeated, systematic, (typically) large-scale, unauthorised, pernicious and knowingly intrusive use of telecommunications networks.

*Amendments not as great as technological and legislative advancements have been*

A2.35 Consumer Affairs Victoria noted that given the significant technological developments that have taken place in recent years, it 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.

A2.36 The ACA submitted that it is disappointed that the Code has not received the review and maintenance that would have perhaps enabled it to reach some better measure of standing in the regulatory landscape. The ACA noted that the Code has been overtaken by actual and proposed State and Federal legislation, as well as better practice codes developed and used by other bodies.<sup>14</sup>

*Opting-out of receiving direct marketing*

A2.37 OCBA submitted that the Code should be amended to require ADMA members to give consumers an 'opt-out' or 'no contact' choice at each point of contact (for instance, in telemarketing as well as on published material).

A2.38 Robin Whittle noted that ADMA's do not call list involves distributing each person's full name, address and telephone number to all companies who pay for it rather than the US National Do Not Call Registry which only publishes numbers and does not link those numbers to any other information. Robin Whittle submitted that this raises privacy issues. Robin Whittle further stated that anyone can pretend to be a telemarketer and purchase the do not call list, and ADMA has no way of ensuring the bona-fides of any such person.

A2.39 The FSCPC noted that the ADMA Code limits the hours/days of telemarketing operation and provides a mechanism for opt-out lists.<sup>15</sup> The FSCPC stated that there are several weaknesses in ADMA's opt-out approach:

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<sup>14</sup> For example, Internet Industry Association, Australian Communications Industry Forum, the E-Commerce Model Code and ADMA's M-Commerce Code.

<sup>15</sup> The FSCPC considered that the privacy intrusion associated with telemarketing can be managed in several ways – limiting hours/days of operation, providing opt-out lists, requiring telemarketing to be conducted on

- consumers must provide extensive personal detail to ADMA in order to register and all of these details are passed onto marketing companies accessing the list;
- consumers see little benefit in listing when ADMA's industry coverage is so low; and
- consumers do not generally trust industry to self-regulate itself.

#### *Allowable calling hours*

A2.40 The FSCPC submitted that ADMA's position on 'allowable' hours represents the lowest possible consumer privacy standard for all attempts in Australia relating to the regulation of telemarketing. The FSCPC noted that ADMA allows calls to take place on any day of the week (including Sunday) between 8am and 9pm, and that only three public holidays are exempt. The FSCPC further noted that residents of New South Wales and Victoria will both have greater protection than that offered by the Code and enforceable through legislation. The Consumer Law Centre Victoria supported this view.

#### *Spam*

A2.41 The FSCPC noted that ADMA has minimal coverage of spam and that the accepted best practice around the world is to prohibit spam except to those consumers who have opted in to receive spam (with an appropriate exception for customers with existing business relationships). The FSCPC noted that opt-in legislation for spam has been drafted which will make the ADMA Code completely redundant.

#### *National Privacy Principles*

A2.42 OFPC noted that the status of principles in the section of the code relating to fair conduct relevant to consumer data protection have changed in that they are now legislative obligations and suggested that a full set of the National Privacy Principles should be taken out of the Code and placed into an appendix to the Code with a clear statement that they are legislative obligations with which organisations must comply so that they are clearly distinguished from the Code.

A2.43 OFPC submitted that there are some provisions in the Code which differ from the obligations contained in the National Privacy Principles in ways that may cause some confusion or contradiction.

A2.44 OFPC suggested that a condition be imposed on the authorisation requiring ADMA to reflect that organisations have to meet both the standard of the Code and obligations of the Privacy Act as this would more clearly demonstrate that

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an opt-in basis (perhaps with exceptions for customers with existing business relationships), limiting access to public databases, or making silent numbers free of charge.



organisations are required to comply with the National Privacy Principles in addition to the Code.

A2.45 Concerns in respect of the part of the Code relating to fair conduct relevant to consumer data protection were also raised by the Queensland Department of Tourism, Racing and Fair Trading (Qld Fair Trading) who suggested that the legislative language reproduced in that part of the Code is not easily understood and that ADMA members would be better served by the sort of (more relevant and simplified) information, including footnotes, found in Part 3 Privacy Requirements of the Model Code.

*Commencement of cooling-off period*

A2.46 Qld Fair Trading submitted that the Code potentially reduces the commencement period related to the cooling-off period by one day from the time specified in the Model Code.

*Conditions of authorisation – independent review*

A2.47 The FSCPC noted that the ACCC previously authorised the Code on the understanding that the Code would be the subject of regular monitoring and independent review, and noted that in four years since the authorisation no review has been conducted.

A2.48 The FSCPC noted that the Code still excludes financial compensation from the list of available sanctions and remedies, and that no review has been conducted of this gap.

*Support for a legislative approach*

A2.49 The FSCPC noted issues raised by the National Competition Council's (NCC) NCP review of the *South Australian Fair Trading Act 1987* in respect of direct marketing:

- the NCC supported equivalent regulation of door to door marketing and telemarketing (because the type of consumer risk was the same);
- the NCC dismissed the ADMA Code as an ineffective alternative to legislation;
- the NCC therefore supported legislation as the most appropriate mechanism for the regulation of direct marketing;
- the NCC predicted that a major weakness of the ADMA Code was that a member faced with sanctions would simply quit membership of ADMA; and

- the NCC highlighted the problem caused by the ADMA Code not covering all direct marketers and also being unlikely to cover unscrupulous direct marketers and fly-by-night operators.

A2.50 The CFA submitted that the existence of industry codes can act to prevent, or delay, the introduction of more effective regulation. In the case of the ADMA Code, the CFA submitted that consumer groups believe that telemarketing is an area where tighter regulation is required, including a national, Government run, ‘do not call’ register. The FSCPC supported this view and suggested that legislation is the appropriate regulatory alternative to the Code.

A2.51 The FSCPC noted that the *Financial Services Reform Act 2001* prohibits door to door sales of financial products completely. Further, it prohibits the telemarketing of certain classes of financial products (such as shares). The FSCPC noted that where it does allow the telemarketing of certain products this concession is backed up by provisions which go well beyond the scope of the ADMA Code:

- tighter calling hours (e.g. no calls on Sundays);
- licensing regime with the ability to ban companies from operating;
- compulsory insurance;
- a requirement that documentation be provided before the sale can be completed; and
- a requirement that the offer must suit the customer personally.

The FSCPC also noted that it is impossible for a financial service licensee to quit membership of their industry complaints scheme when faced with complaints or sanctions because they would lose their licence as a result.

A2.52 The FSCPC submitted that if the ACCC were to reject the application, a debate would begin on alternative models of regulation. The Consumer Credit Legal Centre (NSW) Inc submitted that authorisation of the Code could potentially inhibit or delay other initiatives that could provide more effective controls and remedies than the Code.

A2.53 Robin Whittle submitted that authorising the ADMA Code provides zero or negative benefits to the public whilst giving the impression that:

- outbound telemarketing is properly regulated; and
- that it is a legitimate practice for businesses and charities.

A2.54 Robin Whittle submitted that, in respect of telemarketing at least, there is nothing ADMA could do to alter its code which would result in authorisation by the ACCC leading to net public benefit.

A2.55 Robin Whittle states that when the question of telemarketing regulation arises, ADMA and others can deflect calls for proper regulation by pointing to ADMA's ACCC-approved Code of Practice, with its independent Code Authority as an already existing arrangement which properly protects consumers.

A2.56 Consumer Affairs Victoria stated that, in the absence of a robust national approach and a lack of industry commitment to improving practices in the market, it is focusing on improving the legislative framework to introduce stricter provisions on telemarketing and direct marketing activities.

A2.57 The ACA submitted that the Code embodies a standard of behaviour that is rapidly falling behind industry, consumer and legislative benchmarks.

*Public detriment*

A2.58 Robin Whittle argues that the Code, at least in respect of telemarketing, conveys an overall burden on consumers.

A2.59 The ACA submitted that the Code embodies active consumer detriment.

*Other*

A2.60 Qld Fair Trading raised concerns in respect to the addition of the words "... or suppress" in paragraph 192<sup>16</sup>. Qld Fair Trading submitted that ADMA should justify why the consumer's name might be retained (although suppressed), when the original Code required the ADMA member to remove the consumer's name.

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<sup>16</sup> Paragraph 192 states – "An organisation must remove or suppress a consumer's name from all lists for transfer to a third party at the request of the consumer."

## **Attachment 3**

### **Submissions received from interested parties following the 2004 Code amendments**

In February 2004, submissions were sought from a wide range of interested parties in respect of the (then) 2004 amended Code.

Submissions were received from the following interested parties:

- Australian Government - Attorney-General's Department
- Robin Whittle – First Principles
- Department of Justice – Consumer Affairs Victoria
- Government of South Australia – Office of Consumer and Business Affairs
- New South Wales Office of Fair Trading
- Queensland Government Department of Tourism, Racing and Fair Trading
- Office of the Federal Privacy Commissioner
- Australian Privacy Foundation
- Australian Consumers' Association
- Financial Services Consumer Policy Centre
- Consumers' Federation of Australia
- First Principles

### **Submissions received in response to the 2004 Code**

Whilst a number of interested parties commented positively on aspects of the 2004 Code, a number of remaining issues were raised. An outline of the key additional issues raised in submissions is provided below. As noted previously, full copies of public submissions are available from the ACCC's public register.

#### *Part F of the 2004 Code & National Privacy Principles under the Privacy Act 1998*

A3.1 Interested parties noted that Part F of the amended 2004 Code reflects statutory obligations imposed on private sector organisations by the National Privacy

Principles under the *Privacy Act 1998 (C'th)*. The Attorney-General's Department noted that ADMA has reproduced the National Privacy Principles in an altered format rather than appending the National Privacy Principles to the 2004 Code with a statement that 2004 Code adherents must comply with them. Generally, concerns were raised that the 2004 Code does not make clear the legislative status and effect of the National Privacy Principles and that the 2004 Code does not spell out the key privacy obligations of organisations in unambiguous terms.

- A3.2 The OFPC submitted that the concerns it expressed in its earlier submission in respect of the initial application have not been adequately dealt with in the 2004 Code and that the 2004 Code remains unclear as to its relationship with, and the effect of, the *Privacy Act 1988 (C'th)*.
- A3.3 In particular, concerns were raised as regards to the following:
- the 2004 Code does not make clear that ADMA members must comply with the National Privacy Principles when they are handling an individual's personal information;
  - the 2004 Code does not clarify the relationship between its privacy-related 2004 Code provisions and the National Privacy Principles;
  - the 2004 Code does not make it clear that individuals have the ability to bring privacy-related complaints to the OFPC;
  - lack of clarity as to through what mechanism the 2004 Code would be applied to non-members. The obligations in Part F of the 2004 Code as statutory obligations rather than obligations imposed by ADMA through the 2004 Code;
  - lack of definition for the terms 'organisation' and 'the Commissioner' which are used in Part F and in the National Privacy Principles; and
  - minor replication errors due to replication of the National Privacy Principles into the 2004 Code rather than attachment of the National Privacy Principles as a stand alone document.
- A3.4 The Attorney-General's Department suggested that consumers and ADMA members would find it useful if there was a clear statement at the head of Part F that the relevant clauses are sourced from the National Privacy Principles which impose statutory obligations independent of the 2004 Code.
- A3.5 The OFPC submitted that the 2004 Code needs to further acknowledge and accurately reflect the legislative safeguards available to protect the privacy interests of individuals, if it is to warrant the granting of ADMA's application.
- A3.6 In respect to Part B of the 2004 Code 'Marketing Claims' where it refers to the 'Collection of Personal Information from Minors', the Australian Privacy Foundation submitted that a notice explaining the purpose of collection is required

under the *Privacy Act 1988* (NPP1.3) irrespective of whether the collection is from a minor or an adult and that in this section the 2004 Code should delete the phrase ‘where appropriate’.

A3.7 In respect to Part C of the 2004 Code ‘Fair Conduct Relevant to Telemarketing’, the Australian Privacy Foundation noted that NPP1.3 of the *Privacy Act 1988* requires certain information to be given, when collecting personal information (not just on request), ‘at or before (or if that is not practicable, as soon as possible thereafter), the time of collection’. The Australian Privacy Foundation submitted that the information required by paragraph 89.1 of the 2004 Code (name and contact details) to be given on request will need to be given in relation to every call where personal information is collected, in order to satisfy NPP1.3(a), and paragraph 90<sup>17</sup> should not be read as suggesting that it will always be acceptable to give this information subsequent to a telemarketing call. Whilst noting that paragraph 92 makes the point that calls where personal information is collected need to comply with Part F, the Australian Privacy Foundation suggested that this information needs to be given during the call should be made explicit in the 2004 Code. The Australian Privacy Foundation considered that assurance is required that paragraph 90 of the 2004 Code is not seen as a qualification to the requirement of paragraph 158<sup>18</sup>.

*2004 Code is based on duplicating legislative requirements*

A3.8 Concerns were raised that the 2004 Code is based on duplicating legislation. Interested parties submitted that the 2004 Code should aim at best practice rather than reflecting already mandatory requirements.

A3.9 Concerns were also raised that the 2004 Code has embodied a standard of behaviour that has fallen behind industry, consumer and legislative benchmarks.

A3.10 The New South Wales Office of Fair Trading (NSW OFT) noted that the *Fair Trading Amendment Act 2003* was assented to on 22 July 2003 and contains a number of provisions that relate to direct commerce in New South Wales (NSW). The NSW OFT further noted that apart from the direct commerce provisions (which at the time had not yet commenced), the Act commenced on 25 August

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<sup>17</sup> Paragraph 90 of the Code states – “A telemarketer who is not able to provide the information at the time of the request will ensure that the consumer is provided with the information in a reasonable period after the request is made and in all instances within 30 days of the request.”

<sup>18</sup> Paragraph 158 of the Code states – “At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of: the identity of the organisation and how to contact it; the fact that he or she is able to gain access to the information; the purposes for which the information is collected; the organisations (or the types of organisations) to which the organisation usually discloses information of that kind; any law that requires the particular information to be collected; and the main consequences (if any) for the individual if all or part of the information is not provided.

2003. The NSW OFT submitted that, although there are differences between the 2004 Code and NSW's legislation, it has no objection to authorisation of the 2004 Code as it covers transactions not covered by the direct commerce provisions of the Fair Trading Act, for example, direct marketing (apart from telemarketing) and does not cover direct selling (for example door to door selling). The NSW OFT noted that the 2004 Code makes it clear that where there are discrepancies, legislative provisions override 2004 Code provisions.

#### *ADMA's enforcement of the (2004) Code*

- A3.11 Consumer Affairs Victoria noted that clause 9 of the 2004 Code enables State and Federal regulatory authorities to refer breaches of the ADMA Code to the Code Authority for consideration. It considered that where there are serious breaches of the Code, which are also breaches of the TPA or State or Territory fair trading legislation, or any other legislation, these breaches should be referred to the appropriate regulator for action. Furthermore, it was considered that clause 201.2 of the amended 2004 Code will not achieve this outcome.
- A3.12 The Australian Privacy Foundation submitted that whilst the proposed changes to this section are welcome additions as far as a self-regulatory 2004 Code is able to go, alternative contact details such as email and fax should be provided in respect of the lodgement of complaints as there is no reason for a 2004 Code dealing with electronic marketing to require complaints to be lodged by postal mail only.
- A3.13 The FSCPC raised concerns as to extent of telemarketing covered by the 2004 Code and suggested that less than 50% of telemarketing is likely to be covered. The FSCPC stated that there are hundreds of specialist telemarketing organisations listed in Australian business directories and thousands more organisations who engage in telemarketing from time to time and that it is not the case that all of these organisations channel their work through a few outbound call centres as ADMA appear to be claiming.

#### *Opt-in and Do Not Call register issues*

- A3.14 The ACA stated that the 2004 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 ACA submitted that the 'opt-in' approach should be required for all forms of direct marketing. The ACA considered that at the very least, if there is a rationale to apply 'opt-in' to electronic forms, it must be recognised that the telephone is an interactive electronic device, and the same standards for email and mobile should apply.
- A3.15 The Australian Privacy Foundation submitted that, whilst section 161 of the 2004 Code is a welcome confirmation that at least an opt-out opportunity should be given in all circumstances of trading in personal information for marketing purposes, the Foundation would argue for a higher opt-in standard to be a requirement.

A3.16 Robin Whittle submitted that there are powerful privacy reasons why many residential consumers should not use ADMA's opt-out list and that the list only affects a small subset of the companies and charities (or companies licensing their names for charities) which call them.

A3.17 Robin Whittle provided statistical information concerning the use of ADMA's Do Not Call list:

- 27,897 people are currently registered on the list to opt out of mail only;
- 4,628 people are currently registered on the list to opt out of phone calls only;
- 54,606 people are currently registered on the list to opt out of both mail and phone calls;
- 3,627 people are currently registered on the list to opt out of email;
- 2,791 people are currently registered on the list to opt out of SMS messages;
- 75 members and 8 non-members currently use the Do not mail/do not call file; and
- there were no subscribers to the do not email and m-marketing opt-out due to their recent launches.

ADMA however has noted that subscriptions to the service had grown steadily over the past two years – ADMA considers important to note that those who do subscribe to receive the files are often doing data processing work for other companies (bureaus and mail houses subscribe on behalf of their clients) so the reach of the service is quite vast. ADMA consider that the above figures are not an accurate reflection on the use of the file as a whole.

### *Sanctions*

A3.18 The ACA stated that the 2004 Code regime is vulnerable to the disengagement of parties when even mild sanctions are proposed. The ACA submitted that this compounds the problem of limited industry coverage. Furthermore, the ACA submitted that there is not a hugely compelling necessity to subscribe to the 2004 Code and not a particularly threatening consequence to unsubscribing.



### *Effects of ACCC authorisation*

- A3.19 The FSCPC submitted that the 2004 Code misleads consumers into believing that some level of regulation exists in respect of telemarketing.
- A3.20 The ACA submitted that an unintended endorsement effect may flow from authorisation of the 2004 Code whereby consumers may perceive that the ACCC is endorsing the 2004 Code, rather than indicating that the 2004 Code meets the public benefit test prescribed under Part VII of the TPA.
- A3.21 Robin Whittle submitted that ACCC authorisation of the 2004 Code would constitute government approval of a pernicious business practice and that it would give ADMA unjustified status as an industry self-regulator. Robin Whittle added that authorisation would be used by ADMA and others to show that telemarketing is properly regulated in Australia.

### *Definitions*

- A3.22 Interested parties raised concerns in respect of three definitions, namely: 'Calling Line Identity'; 'Direct Marketing'; and 'Unsolicited'.
- A3.23 Specifically, the FSCPC submitted that the definition of 'Direct Marketing' appears to exclude unsolicited outbound telemarketing calls which entice the consumer to allow a sales person to visit them at their home to provide further information and complete the sale. The FSCPC explained that for consumers, telemarketing calls are an irritation no matter what the nature of the subsequent sales technique is and that if a consumer has taken the trouble to register with the Do Not Call service, they do not wish to receive telemarketing calls of any type. Furthermore, the FSCPC explained that there seems no reason why a consumer should lose their consumer rights under the 2004 Code because the sale is to be completed by a physical visit rather than further electronic communication. The FSCPC noted that it had been contacted by consumer case-work organisations warning that there is a growing trend for pressure sales visits to be set up through initial telephone contact. The FSCPC explained that these types of sales fall between regulatory structures for telemarketing and unsolicited door to door sales. Further, the FSCPC noted that generally this sales technique also represents the type of product (often finance broking) which is of great concern to consumer organisations and regulators.

### *Calling Line Identity*

- A3.24 In respect of Part C 'Fair Conduct Relevant to Telemarketing', the Australian Privacy Foundation submitted that the Service Bureau should not be allowed to block calling line identity. The Australian Privacy Foundation stated that individuals are entitled to be able to record and recover the calling line identity of the actual caller, and the service bureau should be prepared to handle any enquiries

from recipients of calls. The Australian Privacy Foundation noted that paragraph 14 of the CND Guidelines appended to the ACIF Calling Number Display Code provide for the service bureau to give a number for a client but not as a substitute for disclosing their own calling line identity.

#### *Automated Dialling Equipment and Programmed Voice Calling Systems*

A3.25 The Australian Privacy Foundation does not consider that automated dialling equipment and programmed voice calling systems should be permitted as they generate far too many intrusions, unconstrained by the cost of human operators time. The Australian Privacy Foundation notes Article 13(1) of the European Union's *Directive on privacy and electronic communications* 2002/58/EC, which all member states have been required to implement. This Article states:

“The use of automated calling systems without human intervention (automated calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.”

#### *In-house suppression lists*

A3.26 The Australian Privacy Foundation welcomed the addition of paragraphs 186 to 194<sup>19</sup> to the 2004 Code, however considered that paragraph 191<sup>20</sup> should be deleted as there is no reason for a purchase/transaction to override a clearly expressed opt-out preference. Furthermore, the Australian Privacy Foundation submitted that paragraph 194.4<sup>21</sup> should specify a maximum time for ‘cleaning’ of lists, no longer than the 21 days specified for in-house cleaning in paragraphs 187<sup>22</sup> and 188<sup>23</sup>.

#### *MCCA Direct Marketing Model 2004 Code & duration of the authorisation*

A3.27 The Government of South Australia Office of Consumer and Business Affairs (SA Office of Consumer and Business Affairs) noted the following recommendation

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<sup>19</sup> Paragraphs 186 to 194 of the Code relate to in house suppression lists which list recipients who have indicated that they do not wish to receive further marketing communications, including details regarding ADMA's Do Not Mail/Do Not Call/Do Not Email and Mobile Marketing Opt-Out Service protocol.

<sup>20</sup> Paragraph 191 of the Code states – ‘For the purposes of this clause a ‘current consumer’ is any consumer who has made a purchase within the last six months or during a normal selling cycle.

<sup>21</sup> Paragraph 194.4 of the Code states – ‘ADMA will offer the following Do Not Mail/Do Not Call/Do Not Email and Mobile Marketing Opt-Out Service protocol and direct marketers agree to act in accordance with that protocol to the extent that it relates to them: ... within a reasonable time from the date on which the member receives Do Not Mail/Call service/Email and Mobile Marketing Opt-Out Services registry, the member must use it to suppress the names of these consumers, unless they happen to be current customers of the member.

<sup>22</sup> Period defined as no more than 14 days of receiving the request.

<sup>23</sup> Period defined as a maximum additional period of seven days whilst the request is being processed.

made in the MCCA Direct Marketing Model Code Review Report of September 2003:

Recommendation 14 - A permanent Direct Marketing Working Group be established in the upcoming two years to review and update the Model Code at the end of this time.

The SA Office of Consumer and Business Affairs further noted that it has agreed to chair the Direct Marketing Working Group comprising, in addition, the ACT, ACCC and Victoria.

A3.28 In light of the review and that the 2004 Code is based upon the MCCA Direct Marketing Model Code of Practice, the SA Office of Consumer and Business Affairs considered it inappropriate for an authorisation of five years to be granted. The SA Office of Consumer and Business Affairs submitted that a two year authorisation be granted to ensure that ADMA may maintain its 2004 Code and for the 2004 Code to be reviewed following the recommendations of the Working Group to MCCA.

#### *Unfair contract terms*

A3.29 The Qld Office of Fair Trading noted that the 2004 Code makes no mention of unfair contract terms. The Qld Office of Fair Trading considered that as this is an issue presently under consideration by MCCA, the present consideration of the 2004 Code may provide an opportunity for ADMA to take a pre-emptive lead in relation to such unfair contract terms.

A3.30 Consumer Affairs Victoria also expressed concern that the 2004 Code does not make any reference to the requirements relating to unfair terms in consumer contracts contained in Part 2B of the *Fair Trading Act 1999 (Vic)*. It was submitted that the 2004 Code should make reference to unfair contract terms in relation to consumer contracts to ensure that signatories operating in Victoria do not include contractual limitations or conditions in consumer contracts which may be considered as unfair.

## Attachment 4

### Submission from ADMA responding to interested parties

On 4 May 2005, ADMA lodged a submission in response to issues raised by interested parties regarding its 2004 Code. A full copy of ADMA's responding submission is available on the ACCC's website: [www.accc.gov.au](http://www.accc.gov.au).

#### *Definition of call line identity and direct marketing*

- A4.1 ADMA submitted that it is happy to change the definition of Call Line Identity so that it is consistent with the ACIF Code of Practice C522 Call Number Display.
- A4.2 ADMA stated that it represents the direct marketing industry and that this consequently does not extend to direct selling practices. Direct marketing is distinct from direct selling in that direct marketing does not involve face-to-face contact with the consumer. ADMA noted that the Direct Selling Association of Australia represents organisations that use direct selling techniques and they have a their own code of practice that applies to member companies. ADMA submitted that, as it does not represent this section of the industry, it would not be appropriate to extend the definition of direct marketing to include direct selling.

#### *Information to be provided on request*

- A4.3 ADMA noted that NPP1.3 of the Privacy Act requires an organisation to give certain information when collecting personal information. This is replicated in Section F of the 2004 Code and applies to any member that is collecting personal information. Subsection 89 of the 2004 Code requires members to provide the consumers specific information on request in all instances regardless of whether personal information is being collected or not. ADMA submits that, in this way, its 2004 Code adds an additional level of protection for the consumer as they can obtain information about an organisation in all instances, not just where personal data is being collected.
- A4.4 ACCC notes that subsection 89 of the 2004 Code has been substantially reproduced in paragraphs 12-14, Part D of the 2005 Code.

#### *Automated dialling equipment and programmed voice calling systems*

- A4.5 ADMA stated that Article 13(1) of the European Unions Directive on Privacy and Electronic Communications 2002/58/EC does not relate to automated dialling equipment. The Directive relates to programmed voice calling systems and requires that such systems should only be used for marketing purposes with the recipients' prior consent. This standard has been replicated in the 2004 Code. ADMA submitted that the Directive does not prohibit use of automated dialling equipment of programmed voice calling systems.

A4.6 ACCC notes that this directive is replicated in the 2005 Code, in so far as it calls for prior express or inferred consent of recipients of calls using programmed voice calling systems.

*Fair conduct relevant to email marketing, electronic commerce and mobile marketing*

A4.7 ADMA submitted that the provisions in respect of email marketing, electronic commerce and mobile marketing included in its 2004 Code were taken from the draft eMarketing Code of Practice that was in the process of being drafted when the 2004 Code was submitted to the ACCC for authorisation. Since the 2004 Code was submitted to the ACCC, the eMarketing Code of Practice has been completed and registered with the Australian Communications Authority. ADMA proposed to revise its 2004 Code to accurately reflect the eMarketing Code of Practice provisions.

A4.8 ACCC notes that the 2005 Code, when referring to email marketing, electronic commerce and mobile marketing expressly states that members must comply with the eMarketing Code of Practice and the Spam Act 2003.

*National Privacy Principles*

A4.9 ADMA submitted that it would be happy to remove the section titled “Fair conduct relevant to Consumer Data Protection” of the 2004 Code and replace it with a reference to the National Privacy Principles. ADMA submitted that, in doing so, it would follow the wording used in the MCCA Model Code.

A4.10 ACCC note that this change has been effected in the 2005 Code.

*ADMA Do Not Call List*

A4.11 ADMA submitted that the number of registrations on its Do Not Contact Services referred to by the FSCPC are no longer accurate. ADMA provided the following data for April 2005:

Do Not Mail:	174,211
Do Not Call:	144,992
Do Not Mail/Call:	132,805
Total:	425,008

A4.12 ADMA stated that it is inaccurate to conclude that the number of organisations subscribing to the ADMA Do Not Contact files equals the number of organisations that use the files. All ADMA members are required, as a condition of membership, to screen against the Do Not Contact register before undertaking an unsolicited marketing campaign. ADMA noted that a large proportion of member companies will engage the services of a bureau to undertake this screening on its behalf. ADMA submitted that it is therefore the bureau that will subscribe to the Do Not Contact Files not the individual organisation. A data bureau will conduct these

services on behalf of numerous ADMA members. ADMA submitted that it is therefore not necessary for each ADMA member to subscribe to the Do Not Contact files individually.

*NSW Direct Commerce & Victorian Fair Trading Legislation*

- A4.13 ADMA submitted that it has taken into account the introduction of both the NSW direct commerce provisions and the amendment to the Victorian Fair Trading legislation through insertion of subsection 79 of the 2004 Code, which warns members of differing State telemarketing legislation and expressly requires compliance with such laws.
- A4.14 ACCC note that subsection 79 of the 2004 Code has been replicated in subsection 1 of Part D of the 2005 Code.