

Taylor, Kerry Leigh

From: Taylor, Kerry Leigh
Sent: Tuesday, 1 November 2005 9:54 AM
To: 'tara.morice@dcita.gov.au'
Cc: Philp, Susan
Subject: ADMA - Application for revocation of authorisation A40077 and replacement by substitute authorisation A 90876 - Draft Determination

Attachments: 20051031 Ltr to DCITA.doc; ADMA Draft determination 12 Oct 2005.pdf

Tara,

Correspondence and draft determination attached as discussed.

Regards

Kerry Leigh Taylor
Project Officer
Adjudication Branch
Australian Competition and Consumer Commission

Ph: (02) 6243 1175



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DCITA.doc (57 ...



ADMA Draft
etermination 12 Oc.

Our Ref: C2003/938
Contact Officer: Susan Philp
Contact Phone: 02 6243 1354

1 November 2005

Ms Tara Morice
Corporate Communications
Department of Communications, Information Technology and the Arts
GPO Box 2154
CANBERRA ACT 2601

Dear Ms Morice,

**Australian Direct Marketing Association – application for revocation of authorisation
A40077 and replacement by substitute authorisation A90876
Draft Determination**

The Australian Competition and Consumer Commission (the ACCC) has issued a draft determination in respect of the application for revocation of authorisation A40077 and replacement by substitute authorisation A90876 lodged by the Australian Direct Marketing Association (ADMA).

ADMA has sought authorisation in respect of its Direct Marketing Code of Practice (the Code). The Code has been reviewed by ADMA on a number of occasions since lodging its application for substitute authorisation, most recently in September 2005.

The draft determination issued by the ACCC and enclosed for your information and comment is in relation to the September 2005 Code. Please note, the September 2005 Code is at Attachment 1 of this draft determination.

In assessing the ADMA application, the ACCC is required to determine whether the likely benefits to the public of the Code would outweigh the Code's potential anti-competitive effect. On balance, the ACCC considers that the ADMA Code is likely to result in a small net benefit to the public. The ACCC therefore proposes to grant ADMA's application for revocation of A40077 and its substitution by A90876 for a period of three years.

Public Consultation - Pre-determination conference and written submissions

Once the ACCC issues a draft determination, ADMA or any interested party may request that the ACCC convene a 'pre-decision conference'. A pre-decision conference provides the opportunity for interested parties to make oral submissions in relation to the draft determination. A pre-decision conference has been requested in relation to the ADMA draft determination.

In accordance with the statutory timeframes, the ACCC will be holding a conference on **14 November 2005**. The conference will be held at:

ACCC Sydney Office
Level 7, Angel Place
123 Pitt Street
(between Hunter Street and Martin Place)

Please note, video conferencing facilities may be made available in other capital cities upon request. Parties wishing to attend the conference by way of video should notify the ACCC so that arrangements can be made.

Conference registration will be from 9:45am and the conference will commence at 10:00am. Commissioner Jennifer McNeill will chair the conference.

Under the *Trade Practices Act 1974*, the conference may be attended by the applicant and other interested parties. If you wish to attend, you must notify the ACCC of your intention by **cob Tuesday, 8 November 2005** and briefly indicate why you or your company or organisation has an interest in the matter. Notifications must be in writing and addressed to:

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

You can also notify the ACCC by e-mail to: adjudication@acc.gov.au or by facsimile on 02 6243 1211.

You should provide details of a contact name, telephone number, mailing address and, if possible, a facsimile number or e-mail address so that you can be notified of any late changes to conference arrangements.

If you represent a company or organisation you should also provide a list of attendees and their position titles, and indicate who will be the chief spokesperson.

I would also note that, while conference participants may bring outside legal or other professional advisers to assist them, the *Trade Practices Act* prohibits these advisers from participating in conference discussions.

Attached for your information are procedures usually followed at pre-determination conferences.

Alternatively, you are also invited to make a written submission in response to the ACCC's draft determination. Following discussions with interested parties, the ACCC has decided to extend the period for written submissions in respect of its draft determination. Written submissions should be lodged by **cob 16 December 2005** at the following address:

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

Submissions can also be lodged by e-mail to adjudication@acc.gov.au or by facsimile on 02 6243 1211.

Any submission you make will be placed on the ACCC's Public Register. You may request that information you provide in a submission to the ACCC be treated as confidential and not placed on the Public Register. Information excluded from the Public Register for reasons of confidentiality will still be considered by the ACCC when reaching its decision. Guidelines for seeking confidentiality are attached for your information.

The ACCC will consider any submissions it receives, including any oral submissions made should a pre-determination conference be called, and will then release a final determination in relation to ADMA's application.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter please do not hesitate to contact Susan Philp on (02) 6243 1354 or Kerry Leigh Taylor on (02) 6243 1175.

Yours sincerely

Scott Gregson
General Manager
Adjudication Branch

AN OUTLINE OF THE PROCEDURES
USUALLY FOLLOWED AT PRE-DETERMINATION CONFERENCES

The Australian Competition and Consumer Commission (the ACCC) tries to conduct such conferences as informally, flexibly and speedily as possible. Where necessary a conference may be adjourned and reconvened at a later time.

An interested party attending a conference may have the assistance of outside legal or other professional advisers. Although such persons may attend the conference to assist; they are not entitled to participate in the discussion.

The conference will serve a useful purpose in that it gives the ACCC and all interested parties the opportunity to meet face-to-face to discuss the operation and effect of the applicant's conduct and the ACCC's draft determination. The applicant and/or interested persons has/have the opportunity to persuade the ACCC to accept their view. The ACCC benefits from direct contact with the parties, and its perceptions of public benefit and competition are tested in a forum of interested parties where points are often quickly and forcefully made.

1. Preliminary procedures

- (a) When you arrive at the conference you will find that a seating plan may be available. You should identify yourself to the ACCC staff before the conference begins and indicate clearly if you expect messages to be left for you during the conference. Further, please complete the attendance book when arriving at the conference. This assists ACCC staff to identify attendees for the purpose of recording the discussion.
- (b) The Chair (a Commissioner) will open the conference by welcoming those present and outlining the requirements of the Trade Practices Act and the manner in which the conference will be conducted. An agenda may be circulated.
- (c) If you intend to present a written comment (and you are encouraged to do so), it is helpful if the ACCC receives it before the conference date. It can then be copied and distributed at the conference. In this way, both the ACCC and other parties present are assisted, and your submission also forms part of the conference record. If you cannot complete the written submission earlier, it is helpful if you come to the conference with extra copies which can be distributed.
- (d) If you intend to present a submission at the conference and you wish it (or certain details in it) to remain confidential, you should make your confidentiality request to the Chair at the time of presenting the document, and you should state in general terms the reason for your request. The Chair may request other parties present to leave the conference for a short period, so that you may be given the opportunity, if necessary to expand on your reasons.

If your request for the document (or parts of it) to remain confidential is denied you may ask for the document (or parts of it) to be returned to you. Any material returned to you will ordinarily not be taken into consideration by the ACCC in making its final decision (unless, of course, it was supplied from another source).

Any document you present without making any request for confidentiality will be placed on the ACCC's public register, and the information it contains may be used by the ACCC in making its decision. Where confidentiality is granted, the confidential information may also be taken into account, although such material will not be placed on the public register.

2. General procedures

- (a) The conference has been convened to discuss the draft determination, to canvass points of view and to assist the ACCC's weighing of issues and its interpretation of the information given to it.
- (b) The procedure is discretionary. The Chair controls the order of discussion, and may take particular topics separately, so that all the discussion, on any given topic may be heard at the one time.
- (c) The conference is not a court, and there is no right of cross-examination. You may request the Chair to ask questions of other parties present, but the Chair retains the discretion as to whether your questions will be put. The Chair, of course, may also directly question the parties at the conference, and they have discretion whether or not to answer.
- (d) ACCC staff present will make a record of the discussion. This will be in minute form, not a verbatim record. The conference record is placed on the public register, and all who attend the conference will receive a copy.
- (e) When the Chair believes that all present have been given a reasonable opportunity to express their views, he/she may terminate the conference.
- (f) The Chair (and any other Commissioner at the conference) cannot give a final decision at the close of the conference. Each Commissioner is only a representative of the ACCC and is required to report back to the ACCC, which will make the final decision.

3. Other matters

- (a) Following the pre-determination conference, the ACCC will review its draft determination in the light of discussion and further submissions made at the conference (or within a set period of time after the conference), and will publish its final determination as soon as possible thereafter.
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GUIDELINES FOR CONFIDENTIALITY CLAIMS

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

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

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

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

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

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

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

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

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

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

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

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