



**ASIC**

Australian Securities & Investments Commission

Our Reference: CCU-05\0565  
Your Reference: C2003/938

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Dear Mr Gregson

Thank you for your letters dated 12 October and 28 October 2005 addressed to Mr Jeffrey Lucy, Chairman of the Australian Securities and Investments Commission (ASIC). Jeffrey has asked that I reply on his behalf.

Your letters refer to the ACCC's draft determination regarding the Australian Direct Marketing Association Limited (ADMA) 2005 Direct Marketing Code of Practice (the Code). You have invited ASIC to make a written submission to the draft determination and/or attend the pre-determination conference to be held in Sydney on 14 November 2005.

The ACCC has proposed to grant authorisation to the Code. I note that the ACCC's view is that detriments to competition resulting from the Code are likely to be minimal, but that there are likely to be some counterveiling, albeit reduced, benefits to the public. The draft determination states at paragraph 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.*

ASIC has published policy setting out how we will approve codes falling within our jurisdiction (Policy Statement 183, *Approval of financial services sector codes of conduct*). Policy Statement 183 includes standards about consultation, enforcement and independent review, amongst other things. It also states ASIC's view that an effective code must do more than restate legal obligations. For example, by addressing specific industry and consumer issues not covered by legislation or clarifying how a particular industry (or practice or product) should comply in practice with legislation.

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The draft determination states at paragraph 5.4 that ACCC's role in the authorisation process is not to design, or insist upon, the development of an ideal code of conduct, however I note the concerns expressed by some stakeholders<sup>1</sup> about whether the Code is in fact effective, whether it is likely to improve industry standards and/or consumer confidence in the direct marketing industry and whether the authorisation process may lend the code a de-facto "approval" in the eyes of the public.

ASIC is not seeking to make a submission about the net public benefit or level of consumer protection afforded by the Code. I would however like to make some specific comments about how the Code interacts with the *Corporations Act 2001* (the Act) provisions relating to cooling-off and the hawking of financial services and products.

Under the Act, a person must not offer financial products for issue or sale to a retail client in the course of, or because of, an unsolicited meeting or telephone call. There are separate provisions dealing with offers of securities (e.g. shares and debentures), managed investments and all other financial products (e.g. superannuation, life insurance and deposit products)<sup>2</sup>.

As an example of how the provisions operate, in the case of financial products other than securities or managed investments, a telemarketer (offeror) may make an unsolicited call only if the following requirements are met:

- The offeror calls the consumer only during the hours prescribed by the regulations;
- The consumer is not listed on the "No contact/No call" register (maintained by the offeror)
- The consumer is provided with an opportunity to be listed on the "No contact/No Call" register and to select the time and frequency of any future contacts;
- The consumer is given a product disclosure statement (PDS) before becoming bound to acquire the financial product
- The consumer is clearly informed of the importance of using the information in the PDS when deciding whether to acquire the financial product; and
- The consumer is given the name and contact details of the product issuer, an indication of the nature of the information contained in the PDS and the option of electing to have any information in the PDS read out to them.

ASIC has published *The hawking prohibitions: An ASIC Guide* which gives guidance to industry about how ASIC will administer these provisions. For the purposes of the above example, the ASIC guide states that an offeror will need to ensure that they can satisfy *all* of the above requirements for the particular telephone call.

Notwithstanding paragraph 12 of the Code (*Conflict with legislation*) and that the Code is intended to cover a broad range of products and services, the Code requirements under Part D *Fair conduct relevant to telemarketing* and Part H *Respecting Consumer Preference* do not meet the minimum requirements of the Act

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<sup>1</sup> Attachments 2 and 3 to the draft determination

<sup>2</sup> See sections 736, 992AA and 992A respectively

relating to unsolicited offers of financial products and services over the telephone. For example, there seems to be no positive requirement on members to offer the consumer the opportunity to be listed on the member's suppression file (either at the time of the offer or any other time). Nor does the code make any mention of express disclosure requirements that may attach to the offer of certain products or services.

On their face, the express code provisions therefore fall short of the legal requirements relating to offers of financial services and products, and I note that paragraph D1 *Status*, refers only to compliance with relevant State legislation relating to offers via telemarketing.

ASIC has not undertaken any assessment of what might be *best practice* standards relating to direct marketing (although a range of comments are made to this effect in the submissions). The draft determination discusses the issue of code standards from paragraph 5.60, and ASIC also accepts that public benefits will be limited if a code is not seen to set best practice standards of conduct, or at least to set standards that exceed existing legal requirements. In this context I also note that the cooling off periods of *7 days or more* referred to in Part C of the code set a minimum significantly lower than the 14 days that apply to certain financial products<sup>3</sup>.

Finally, I would like to confirm the comment attributed to the Financial Services Consumer Policy Centre (FSCPC) in paragraph 2.51 of Attachment 2. The FSCPC notes that all licensed providers of financial services or products must be a member of an ASIC approved external dispute resolution scheme which has jurisdiction to deal with consumer complaints about the way in which the financial product or service was sold, including if it was sold via direct marketing.

Thank you for the separate invitation to attend the pre-determination conference. I confirm that ASIC will not be attending, however I am happy to discuss any of the issues raised in this letter.

Yours sincerely



Berna Collier  
Commissioner

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<sup>3</sup> refer section 1019A of the Act