



## Department of Justice

Director  
Consumer Affairs Victoria

3/452 Flinders Street.  
Melbourne, Victoria 3000  
GPO Box 123A  
Melbourne, Victoria 3001  
Telephone: (03) 9627 6017  
Facsimile: (03) 9627 6040  
Email: consumer@justice.vic.gov.au  
DX 110220

FILE No:

DOC:

MARS/PRISM:

14 NOV 2005

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

Dear Mr Gregson

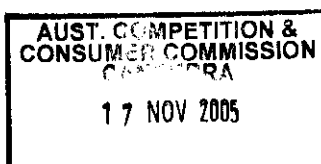
### **Australian Direct Marketing Association -application for revocation of authorisation A40077 and replacement by substitute authorisation A90876 – draft determination**

Thank you for your letter dated 12 October 2005 seeking any submission that Consumer Affairs Victoria might make on this draft determination, and for your letter dated 28 October 2005 advising of the pre-determination conference in this matter on 14 November 2005 and the extended deadline for submissions to 16 December 2005.

Since the last time that submissions were invited in relation to this matter (February 2004) Division 2A of Part 4 of the *Fair Trading Act* 1999 has been inserted (commencing 30 August 2004) to regulate telemarketing of sales over \$100, including a cooling-off right, formal contract requirements, restricted contact hours and a 'no call back' rule. We note that these provisions (and similar NSW provisions that also came into effect on 30 August 2004) are not referred to in the 'Commonwealth, State and Territory legislation' section of the draft determination.

We refer to and repeat the concerns set out in our previous submissions and, in particular, emphasise our view that legislative protections provide the minimum basis for consumer protection and industry codes should adopt standards that go beyond legislative standards. While in some respects the revised Code provides for matters beyond existing legislative requirements, we do not believe that it meets our concerns in significant areas. For instance:

- Part C - particularly items 1 (Misleading and Deceptive Conduct), 2 (False Claims), 5 (Content of Direct Marketing Communications), 11 (Unfair Conduct), 17 (Pyramid Sales), 18 (Availability of Goods or Services), 25 (Payment) and 41-46 (Unordered Goods or Services) - largely traverses matters that are already provided for in the *Trade Practices Act* and *Fair Trading Acts* prohibitions on misleading/deceptive conduct, false representations, unconscionable conduct, pyramid selling, bait advertising, accepting payment without being

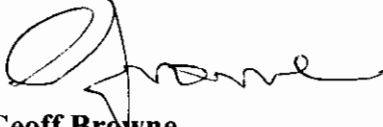


able to supply, unsolicited goods and services, and false invoicing, or simply provide examples of breaches of such prohibitions.

- In particular, a significant advance on the prohibition under item 3 of Part C and item 15 of Part D on members representing that they are undertaking market research when the real purpose is direct marketing, and one that would remove any temptation on the part of direct marketers and any confusion on the part of consumers, would be to prohibit contacts that mix direct marketing and market research.
- The cooling-off right (items 26-40 of Part C) do not go further than existing rights for door-to-door sales over \$50 and tele-sales over \$100 under the Victorian *Fair Trading Act* and in several respects offer less, eg: a 7 business-day cooling-off period (effectively 9 ordinary days) as against 10 ordinary days under the Act; the exceptions in item 31 (none of which are in the Act); the requirement that the consumer return goods in their 'original' condition (as against an obligation to take reasonable care of the goods in the Act); obligation on the consumer to return the goods at their cost (as against a right under the Act for the consumer to require the supplier to pick up the goods); refunds to be paid within 7 days of cancellation (as against immediately under the Act).
- The procedure that members must follow when an order cannot be delivered within the stipulated time (items 20-23) is essentially for the benefit of members rather than consumers, in that the consumer is normally entitled to cancel the sale and receive a refund for a breach of the delivery term (and so it is misleading to require members to 'offer the consumer the opportunity to cancel') and it is therefore to the member's advantage to attempt to set up another delivery time. To be a useful consumer-protection, it should simply stipulate that unless a longer time is agreed with the consumer, members must deliver within 30 days and that a breach entitles the consumer in all cases to a refund, unless the consumer agrees to extend the time for delivery.
- It is unhelpful to members to require that their direct marketing communications to be 'clear and unambiguous' (item 4 Part C); or that they 'avoid the use of high-pressure tactics that could be construed as harassment' (item 4 of Part D). Specific directions are required in order for these requirements to have any significance or value, directions that go further than legislative requirements (eg the requirements under section 163 of the Victorian *Fair Trading Act* regarding the clarity of consumer documents).
- The requirements under items 51 and 52-56 of Part C regarding commercial communications directed to minors misses the point that minors cannot legally enter into contracts for the sale of goods or services ('restricted' or otherwise). The detailed requirements regarding commercial communications directed to minors (eg that members should not 'exploit their credulity, loyalty, vulnerability or lack of experience') are unnecessary as commercial communications simply should not be directed to minors, both because they cannot legally enter into contracts of sale and because it is inappropriate to attempt to persuade them to get their parents etc to purchase the relevant product. We do not believe that many successful commercial communications can be made to minors that do not, to some extent, 'exploit their credulity, loyalty, vulnerability or lack of experience'.
- Item 20 of Part D states that members must not telemarket to consumers before 9am or after 8pm or at any time on Sundays or public holidays unless the consumer consents or unless the consumer has previously agreed to receive a call outside the hours. However, the Victorian *Fair Trading Act*, which has similar call limitations, provides for an outright prohibition and does not exempt telemarketers who (allegedly) have obtained the consumer's consent.

For these reasons and for the reasons set out in our previous submissions, Consumer Affairs Victoria does not believe that there is sufficient public benefit in the revised Code to warrant a further authorisation. Consumer Affairs Victoria will not be participating in the pre-determination conference.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geoff Browne', written in a cursive style.

**Geoff Browne**  
**Acting Director**