

PRE DETERMINATION CONFERENCE

MINUTES OF MEETING

**Application for revocation of authorisation A40077 and
replacement by substitute authorisation A90876**

lodged by

Australian Direct Marketing Association (ADMA)

**Pre-Decision Conference
9:45 am, 14 November 2005
ACCC office - Sydney**

Attendees:

Australian Competition & Consumer Commission	Jennifer McNeill (Chair) Commissioner Susan Philp A/g Director - Adjudication Kerry Leigh Taylor Project Officer – Adjudication
Australian Direct Marketing Association (Applicant)	Ms Jodie Sangster Manager – Regulatory and Legal Affairs
Direct Marketing Code Authority	Mr John Wood Chair Mr Bill Dee Consumer Representative Mr Richard Watson Ace Insurance Mr Robin Brown Consumer Representative
First Principles	Mr Robin Whittle
Fundraising Institute-Australia Ltd	Ms Sue-Anne Wallace Chief Executive Officer
Office of the Privacy Commissioner	Mr Andrew Solomon Director Policy
Royal Institute for Deaf and Blind Children	Mr Frank Antonini Manager, Call Centre Fundraising
Financial Services Consumer Policy Centre	Mr Chris Connolly Director

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Introduction

ACCC Commissioner Jennifer McNeill welcomed attendees and made some introductory remarks outlining the purpose of the conference and declared the pre-determination conference open.

Given the delay in opening the conference, it was decided to commence in the absence of the calling party, Mr Robin Whittle.

Parties introduced themselves and Commissioner McNeill invited ADMA to make the opening statement in the absence of Mr Whittle.

Bill Dee – outlined that the authorisation process involves balancing the anti-competitive detriments against the public benefits. The anti-competitive detriments of the Code are low, if any, and are offset by the public benefits of the Code.

Charities

Frank Antonini submitted that:

- Generally speaking, fundraisers supported the Code; however, concerns have been raised in relation to allowable calling hours.
- Charities in NSW are regulated by the *Charitable Fundraising Act 1991* – as a result of this legislation, charities in NSW are required to adopt the ADMA Code of Practice. Consequently, allowable calling hours available to charities in NSW would be reduced in comparison to charities in other states.
- Reduced calling hours would result in a loss of approximately \$100 000 per annum to charities. This sum cannot be retrieved from another source.
- In terms of competition, NSW charities would be placed at a disadvantage when compared to other state based charities if the Code were authorised. Charities based outside NSW are not bound by the ADMA Code and therefore not restricted in the same manner in terms of calling hours.
- It is recommended that ADMA adopt the Ministerial Council on Consumer Affairs (MCCA) Direct Marketing Code of Practice, 9:00am to 9:00 pm provisions.

Sue Ann Wallace submitted that:

- She supported the view of Frank Antonini.
- Charities are exempt from a number of legislative provisions including the restrictions on allowable calling hours. As a result of the combination of the *Charitable Fundraising Act 1991 (NSW)* and the ADMA Code of Practice, the benefits of these exemptions would be lost to charities because of the wording of clause 20 of the Code of Practice.

- In addition, day light savings creates a differential in the ‘available calling hours’ amongst the states. Legislation in combination with the Code of Practice adds another degree of complexity.
- It was thought that following the creation of the MCCA Model Code, allowable calling hours would be standardised. However provisions of the Model Code relating to calling hours were not adopted by ADMA.
- The Fundraising Institute – Australia Ltd supported the application for authorisation of the Code of Practice, however, would like the provisions relating to allowable calling hours to be revisited by ADMA so that the unintentional reduction in calling hours available to charities was corrected and the intent of the legislative exemptions could take effect.

Robin Whittle

Commissioner McNeill welcomed Mr Whittle to the conference, briefly outlined procedures and summarised the submissions already heard. Mr Whittle was then invited to make a statement.

Mr Whittle submitted generally that:

- If the telemarketing legislation goes ahead as proposed then any concerns he has regarding the ADMA Code of Practice would disappear.
- By way of introduction, Mr Whittle has been active in the telemarketing debate since 1992. He is an independent advocate and represents the views of no particular organisation. He concentrates primarily on the social aspects of telemarketing and the cost to small business.
- In relation to charities, Mr Whittle believes that telemarketing is an inefficient method of fund raising for two reasons. Firstly, it may be used by unscrupulous people to mislead consumers; and secondly, the costs of telemarketing could be better utilised by charities. Mr Whittle does not support telemarketing by charities as a means of raising funds.

Mr Whittle’s submission from this point can be broadly divided into 4 areas:

- ACCC authorisation as endorsement
- ADMA / Code Authority performance; ADMA as self regulator and the Code of Practice
- Transparency surrounding the ‘do not call/ do not contact register’
- Privacy issues – misuse of the information supplied to the do not call / do not contact register

Please note, submissions by attendees at the conference responding to matters raised by Mr Whittle have been included for ease of reference.

ACCC authorisation as endorsement

- Mr Whittle submitted that 'ACCC authorisation' is seen by the public as 'government approval' of ADMA as the self regulator for the direct marketing industry. Mr Whittle further submitted that ADMA are not up to the task of self regulator. In support of this submission, Mr Whittle outlined the difficulties he had encountered in obtaining the latest Code Authority reports.
- Mr Whittle stated that ACCC authorisation will encourage people to trust ADMA with personal details such as name, address and telephone number (for the purpose of the 'do not call / do not contact register'). From the information available, it is not clear as to what happens with this information.
- In response Bill Dee noted that authorisation was not approval. He further noted that ACCC has a statutory test that it must apply irrespective of its view of ADMA or the Code of Practice.
- Commissioner McNeill questioned Mr Whittle on specific examples where ACCC authorisation has been seen as approval or endorsement of the ADMA Code.

In response, Mr Whittle stated that he was unable to provide a specific instance, however it was the general understanding of the public that was in issue.

- Robin Brown agreed with Mr Whittle that there is a perception in the public that ACCC authorisation amounts to endorsement; however he considers that the issue is outside the scope of this pre-determination conference.
- Mr Whittle further submitted that the perception of 'ACCC approval' to a code could amount to a 'net public dis-benefit' which should be considered when balancing the anti-competitive detriments and public benefits.

ADMA / Code Authority performance; ADMA as self regulator and the Code of Practice

- Mr Whittle submitted that ADMA is not an adequate self regulator for the telemarketing industry and pointed to the lack of availability of current reports on the ADMA website as a demonstration of this point. In addition, Mr Whittle submitted, there is no information available from ADMA in relation to the use of the 'do not call / do not contact register'. Mr Whittle noted that he had sought this information from ADMA but that ADMA were not able to provide the information.
- Roger Watson submitted, that from a personal perspective, he found ADMA's do not call register to be effective. He explained that he has 2 telephone lines at home and has one registered with ADMA's do not call service; the other phone line is not. The telephone number registered with ADMA has received no telemarketing calls. The unregistered phone continues to receive telemarketing calls.

- Bill Dee submitted that ADMA, in regulating direct marketing acts in front of other statutory devices. The Code of Practice 'fills in' gaps in the legislation as well as facilitating compliance with legislation by direct marketers. In addition, the Code of Practice in combination with the Code Authority provides a further avenue of review of conduct and complaints. In regard to service performance, ADMA is constantly open to criticism.
- Jodie Sangster stated that the Code does not only 'cover' legislation but in most areas goes beyond what is required by legislation (e.g. Privacy Act). For example, the provisions relating to electronic and mobile marketing go beyond what is required under legislation. Ms Sangster further submitted that it was vitally important for direct marketers to be able to go to a comprehensive document that outlines their responsibilities under various pieces of legislation.
- In relation Code Authority reporting, John Wood submitted, the Authority relies on ADMA for secretariat services. The last annual report was signed in October last year, it had been misplaced by ADMA. This matter had been discussed between ADMA and the Code Authority and timeliness of reporting had been raised as an issue.
- Robin Brown submitted that the Code of Practice, through the Code Authority, makes a valuable contribution by offering benefits to consumers that are not available at law. To achieve the same result through formal legal processes would be very costly to consumers. In addition, the Code Authority demands a higher standard from those in the industry.
- Mr Whittle agreed with Mr Brown regarding self regulation in terms of the benefits and avenues of redress not available at law. Mr Whittle stated that his concern was primarily related to the intrusive nature of telemarketing calls.
- In relation to enforcement of the Code, Mr Wood submitted that in the period in which the Code Authority had been operating, there had only been one instance where the use of sanctions was considered. Mr Wood stated that in addition to responding to individual complaints, the Code Authority also monitors complaint trends, for example where a particular member has a high number of complaints against them. If a particular member is identified, they are invited to address the Code Authority and explain complaint handling procedures and possible break down in systems which may have led to the complaints. One such process led to a detailed investigation and ultimately the relocation of a call centre.

Transparency surrounding the 'do not call / do not contact register'

- Mr Whittle expressed a general concern about the transparency of the 'do not call / do not contact register', specifically, figures in relation to subscription to the register were not publicly available.
- Ms Sangster submitted that they do have figures relating to the numbers of subscribers to the 'do not call / do not contact register', ADMA however ,

consider that the figures are not representative of the use of the register due to the nature of the telemarketing industry. Ms Sangster noted that third parties will often provide a 'pre-screened' list to the organisation carrying out the telemarketing campaign on their behalf.

More generally, Ms Sangster noted that access to the 'do not call / do not contact register' is governed on a licence basis. Under the provisions of the licence agreement, subscribers automatically come within the ambit of the Code Authority.

ADMA are currently conducting an audit of members who use the 'do not call / do not contact register' including members who access the list through third parties.

Ms Sangster advised further that a 'list washing' service was available from ADMA in addition to the more traditional method of supplying a data file containing names of persons who are not to be contacted. Using the 'list washing' system, direct marketers are able to submit a list to ADMA which will then be screened against the 'do not call / do not contact register' and returned. Presently the two systems are running parallel as some members, notably charities, do not have the technology to support the list washing procedure.

- Mr Watson noted that as an ADMA member, ACE Insurance provides in its' contracts with telemarketers, the requirement that the contractor screen against the ADMA do not call register.

Privacy issues – misuse of the information supplied to the do not call / do not contact register

- Mr Whittle submitted that for persons attempting to maintain privacy such as politicians or aggrieved spouses, a danger existed in putting their details on a do not call / do not contact register. Concern was raised that the information could be used inappropriately by unauthorised third parties. This, Mr Whittle submitted, is a fundamental flaw in the ADMA system.
- Mr Whittle suggested that a list washing system was the more appropriate means of effecting the 'do not call / do not contact register'.

Other Issues Raised

Role of telemarketing in charitable fundraising activities

- Ms Wallace noted that charities are highly regulated however not in relation to the mechanisms used to raise funds. No Government reviews into charities have suggested they should not use telemarketing as a fundraising technique.
- Mr Whittle stated that his concern was broader. People who provide credit card details over the phone are vulnerable, not only in relation to charities, but all telemarketing transactions involving credit details.

- In response to this issue, Ms Wallace stated that misuse of credit details amounted to fraud and was controlled by a separate piece of legislation.

Acceptance of telemarketing by consumers

- Mr Whittle submitted that there was a general problem with telemarketing; ADMA conducted research in 1992 whereby 80% of people did not want to receive telemarketing calls.
- Ms Sangster responded by stating that research was conducted last year which indicated that 50% of people responded to calls, which could indicate that there could be a negative perception of the word 'telemarketing' rather than the call itself.

Chris Connolly – Financial Services Consumer Policy Centre

- Mr Connolly noted that he had spoken to other consumer advocates and confirmed that additional written submissions to ACCC would be provided before 16 December 2005. However it was noted that the DCITA National do not call register discussion paper would take precedence.

Mr Connolly submitted that:

- The test applied by the ACCC was inadequate in assessing Codes of Practice. In order to pass the test, the public benefit only needs to be minimal.
- Generally, the ADMA Code of Practice is unpopular among consumer and privacy advocates. This is primarily due to its provisions relating to telemarketing.
- The telemarketing provisions in the ADMA Code raise a number of issues relating to:
 - coverage
 - outcomes in terms of enforcement (no financial redress)
 - consumer awareness (low number of complaints)

Effect on legislative developments

- Approval of the ADMA Code may deter or hamper the development of legislation that creates 'A national do not call register'. Mr Connolly submitted there would be no detriment in the ACCC delaying the decision for authorisation.
- In responding to this issue, Ms Sangster noted that the DCITA discussion paper was not Government policy and any legislation (if agreed) would be some time away. ADMA was fully supportive of the development of a national call register.
- It was noted by Mr Wood that legislation, if and when passed, would override any Code of Practice authorised at this point.

Barriers to entry

- In relation to anti-competitive detriment of the Code, access to the do not call / do not contact list could be a possible barrier to entry. The 'do not contact / do not call' register has grown in size and to a telemarketer represents a money saving resource in that funds will not be wasted on calling people who are on the register. It could be argued that accessing the list could be perceived as a barrier to entry to the telemarketing industry. In particular, the anti-competitive detriment arises from the price differential between members and non-members.

In responding to this issue Ms Sangster noted the cost of accessing the do not call / do not contact list are:

- \$450 p.a for members
- \$800 p.a for non-members (approximately 15 non-members are subscribers in their own right; this figure does not account for third party subcontractor arrangements)
- \$80 one off fee for single telemarketing campaigns
- Non-member one off fee to be provided
- Same fees were charged for the 'list washing' service

Ms Sangster explained further, that not all ADMA members would subscribe to the do not call / do not contact list. Members of ADMA include a wide range of industries for example printers; some members would never conduct a telemarketing campaign and would therefore have no use of the 'do not contact / do not call' register.

Benefits to the public of the ADMA Code

Mr Connolly provided a number of comments in relation to the perceived public benefits of the ADMA Code.

- The Code falls behind existing legislation in a number of areas, for example 'cooling off periods'.
- In relation to review of the Code, in the experience of consumer advocates, ADMA must be 'dragged' into debate. Other codes are independently reviewed as a matter of course. It was a condition of the previous authorisation that the Code of Practice be reviewed and kept up to date. This has not happened.
- The 2005 Code of Practice had, after a considerable time delay, 'caught up' to legislation in a number of areas, as a response to submissions received in relation to a previous version of the Code, for example allowable calling hours.
- Consumer advocates have raised concerns regarding the lack of independent review of the Code, despite this being a condition of the last authorisation. The original authorisation was only granted after considerable debate. If a condition such as independent review is imposed it should be monitored to ensure that it is complied with. For example, an automatic revocation should be considered for non-conformance with a condition.

- If a consumer has a complaint involving telemarketing, there are number of other avenues of redress, all of which offer better outcomes than can be achieved through the Code Authority, for example the telecommunications ombudsman. As a result the public benefits from having avenues of redress in addition to those allowed at law, as assessed by the ACCC, is minimal.
- ADMA have stated that, as an organisation, they cover 80% of all telemarketing sales. This has remained consistent since 1988 with no variation.
- Outside the ACCC context, to achieve a benefit for the public, the Code would need to be better than legislative requirements, or alternatively, have greater coverage.

In regard to issues raised by Mr Whittle, Mr Connolly submitted

- There is broad support for the list washing process. This would significantly negate a number of privacy concerns.
- Regarding the authorisation versus endorsement argument, it was difficult for the public to distinguish between the two. The public perception of authorisation as endorsement was not assisted by ACCC 'launching' the original Code in 1998. This is a serious concern and could impact on the current 'national do not call register' discussion paper.

Final Comments

- In relation to the independent Code reviews, Mr Wood agreed with Mr Connolly that all codes should be subject to independent review. The ADMA Code review was problematic in that it was tied to the MCCA Code review. Mr Wood submitted that a formal review mechanism would be beneficial and further submitted that the authorisation process in itself amounts to a review.
- It had been previously stated that no consumer groups supported the Code. Mr Wood submitted that this was incorrect. The ACA does support the Code and is represented on the Code Authority by Robin Brown. It is very important that the Code Authority has support from both industry and consumer bodies.
- Mr Whittle stated that it is unclear from the Annual Report how the Code Authority actually works in terms of meetings, offices etc. In response, Mr Wood advised:-
 - the secretariat services are provided to the Code Authority by ADMA;
 - ADMA deal with the majority of complaints at first instance;
 - the Code Authority meets approximately 4 times a year and reviews escalated complaints, complaint handling including whether or not the consumer is satisfied or dissatisfied with the result. The Code Authority will take further action as required.
 - in addition the Code Authority examines complaint trends and will take steps as outlined earlier.