

Mr. Scott Gregson
General Manager – Adjudication
ACCC
PO Box 1199
Dickson ACT 2602

6th June 2006

Dear Mr. Gregson,

RE: ADMA Code of Practice – Application for ACCC Authorisation

I write with reference to our application for Authorisation of the ADMA Code of Practice.

Further to our recent meeting, ADMA has made the following amendments to the draft ADMA Code of Practice:

- **Part D, Section 1:** This section has been amended to include a reference to applicable Federal telemarketing legislation, including the Financial Services Reform Act 2001.
- **Part D, Section 1:** A footnote has been added to this section to highlight that State-based telemarketing laws currently exist in NSW and Victoria
- **Part D, Section 20:** This section has been amended to clarify that the primary obligation of an ADMA member is to adhere to the permitted calling hours set out in Federal or State legislation. It also makes clear that the calling hours set out in the ADMA Code of Practice only apply in the absence of applicable Federal or State legislation. This amendment addresses the concern of Consumer Affairs Victoria, that the calling hours set out in the ADMA Code of Practice were less restrictive than the hours permitted under the Victorian Fair Trading Act 1999.
- **Part G, Section 1:** An amendment has been made to this section to include a reference to Annex 1, which contains a complete version of the Australian National Privacy Principles.
- **Annex 1:** This annex has been added to allow the National Privacy Principles to be reproduced in full.


In addition to the above amendments, further consideration has been given to the request that ADMA invoke procedures to ensure that the Code of Practice continues to accurately reflect the Federal and State laws that apply to direct marketing. It was ADMA's understanding that, should the ACCC grant Authorisation, it would do so on the condition that the Code would be reviewed on an ongoing basis and updated where necessary to ensure accurate reflection of applicable Federal and State laws. ADMA would be comfortable to operate under this condition.

To reinforce this condition, ADMA undertakes to conduct an internal review of the ADMA Code of Practice on an annual basis to ensure it accurately reflects current legislation applicable to direct marketing practices. This review will ensure that any relevant new Federal or State legislative provisions are incorporated into Code of Practice on an ongoing basis. After conducting the review, ADMA will produce a report outlining the review undertaken, which will be signed-off by an independent auditor or solicitor prior to being submitted to the ACCC on the anniversary of Authorisation.

I look forward to your feedback on the above matters, in particular (a) whether the amendments to the Code adequately resolve the concerns raised by the ACCC with regard to existing legislative provisions; and (b) whether the undertaking in the form above addresses the ACCC request for further information outlined in your letter dated 20th December 2005.

I look forward to hearing from you.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Edwards', with a long horizontal flourish extending to the right.

Rob Edwards
Chief Executive Officer

ADMA

DIRECT MARKETING CODE OF PRACTICE

June 2006

(DRAFT)

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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 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

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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 sweepstakes¹

- 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;
 - 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*.

¹ 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.

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 intended²; and

² *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.*

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

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 given.

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:
 - 1.1 some market sectors are subject to Federal legislation³ that imposes obligations on organisations conducting telephone marketing; and
 - 1.2 some States have legislation that places obligations on organisations that supply or offer to supply goods or services via outbound telephone marketing⁴.

When undertaking an outbound telephone marketing campaign Members should contact ADMA to ensure compliance with Federal and 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.

³ Financial Services Reform Act 2001

⁴ The New South Wales and Victorian Fair Trading Acts include provisions relating to telephone marketing.

- 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 call⁵.
- 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.
- 19 A telemarketer must provide the consumer with a clear opportunity to accept or

⁵ *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.*

decline the organisation's offer.

PERMITTED CALLING TIMES

- 20 Members making outbound telemarketing calls must:
- 20.1 comply with the permitted calling hours set out in applicable Federal or State legislation⁶; and
 - 20.2 in the absence of applicable Federal or State legislation, only make an outbound telephone call to contact a consumer between 9 am and 8 pm⁷ Monday – Saturday. Calls should not be made on Sundays or the following public holidays:
 - _____
New Years Day
 - _____
Australia Day
 - _____
Good Friday;
 - _____
Easter Monday;
 - _____
Anzac Day
 - _____
Christmas Day
 - _____
Boxing Day (26th December)
- 21 If the consumer has previously agreed to receive a telemarketing call from the organisation outside of the hours set out in Section D20.2 or on 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 a 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

⁶ The Financial Services Reform Act 2001, the Victorian Fair Trading Act 1999 and the NSW Fair Trading Act 1987 contain provisions relating to permitted calling hours for telephone marketing.

⁷ Local time at the consumer's location

- 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
 - 37.2 is intended to be relied upon for contractual or other evidential purposes
- 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 3rd 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*. The National Privacy Principles are reproduced in Annex 1 of this Code of Practice and relate to the following:

- 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; or
 - 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; or
 - 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.

ANNEX 1. AUSTRALIAN NATIONAL PRIVACY PRINCIPLES

The National Privacy Principles have been extracted from the Privacy Act 1988

1. Collection

1.1 An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

1.2 An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.

1.3 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:

- (a) the identity of the organisation and how to contact it; and
- (b) the fact that he or she is able to gain access to the information; and
- (c) the purposes for which the information is collected; and
- (d) the organisations (or the types of organisations) to which the organisation usually discloses information of that kind; and
- (e) any law that requires the particular information to be collected; and
- (f) the main consequences (if any) for the individual if all or part of the information is not provided.

1.4 If it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual.

1.5 If an organisation collects personal information about an individual from someone else, it must take reasonable steps to ensure that the individual is or has been made aware of the matters listed in subclause 1.3 except to the extent that making the individual aware of the matters would pose a serious threat to the life or health of any individual.

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2. Use and disclosure

2.1 An organisation must not use or disclose personal information about an individual for a purpose (the **secondary purpose**) other than the primary purpose of collection unless:

- (a) both of the following apply:
 - (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;

- (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
- (b) the individual has consented to the use or disclosure; or
- (c) if the information is not sensitive information and the use of the information is for the secondary purpose of direct marketing:
 - (i) it is impracticable for the organisation to seek the individual's consent before that particular use; and
 - (ii) the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; and
 - (iii) the individual has not made a request to the organisation not to receive direct marketing communications; and
 - (iv) in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that he or she may express a wish not to receive any further direct marketing communications; and
 - (v) each written direct marketing communication by the organisation with the individual (up to and including the communication that involves the use) sets out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be directly contacted electronically; or
- (d) if the information is health information and the use or disclosure is necessary for research, or the compilation or analysis of statistics, relevant to public health or public safety:
 - (i) it is impracticable for the organisation to seek the individual's consent before the use or disclosure; and
 - (ii) the use or disclosure is conducted in accordance with guidelines approved by the Commissioner under section 95A for the purposes of this subparagraph; and
 - (iii) in the case of disclosure—the organisation reasonably believes that the recipient of the health information will not disclose the health information, or personal information derived from the health information; or
- (e) the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent:
 - (i) a serious and imminent threat to an individual's life, health or safety; or
 - (ii) a serious threat to public health or public safety; or
- (f) the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities; or
- (g) the use or disclosure is required or authorised by or under law; or

(h) the organisation reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by or on behalf of an enforcement body:

- (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law;
- (ii) the enforcement of laws relating to the confiscation of the proceeds of crime;
- (iii) the protection of the public revenue;
- (iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;
- (v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

Note 1: It is not intended to deter organisations from lawfully co-operating with agencies performing law enforcement functions in the performance of their functions.

Note 2: Subclause 2.1 does not override any existing legal obligations not to disclose personal information. Nothing in subclause 2.1 requires an organisation to disclose personal information; an organisation is always entitled not to disclose personal information in the absence of a legal obligation to disclose it.

Note 3: An organisation is also subject to the requirements of National Privacy Principle 9 if it transfers personal information to a person in a foreign country.

2.2 If an organisation uses or discloses personal information under paragraph 2.1(h), it must make a written note of the use or disclosure.

2.3 Subclause 2.1 operates in relation to personal information that an organisation that is a body corporate has collected from a related body corporate as if the organisations primary purpose of collection of the information were the primary purpose for which the related body corporate collected the information.

2.4 Despite subclause 2.1, an organisation that provides a health service to an individual may disclose health information about the individual to a person who is responsible for the individual if:

(a) the individual:

- (i) is physically or legally incapable of giving consent to the disclosure; or
- (ii) physically cannot communicate consent to the disclosure; and

(b) a natural person (the **carer**) providing the health service for the organisation is satisfied that either:

- (i) the disclosure is necessary to provide appropriate care or treatment of the individual; or
- (ii) the disclosure is made for compassionate reasons; and

(c) the disclosure is not contrary to any wish:

- (i) expressed by the individual before the individual became unable to give or communicate consent; and

(ii) of which the carer is aware, or of which the carer could reasonably be expected to be aware; and

(d) the disclosure is limited to the extent reasonable and necessary for a purpose mentioned in paragraph (b).

2.5 For the purposes of subclause 2.4, a person is **responsible** for an individual if the person is:

(a) a parent of the individual; or

(b) a child or sibling of the individual and at least 18 years old; or

(c) a spouse or de facto spouse of the individual; or

(d) a relative of the individual, at least 18 years old and a member of the individual's household; or

(e) a guardian of the individual; or

(f) exercising an enduring power of attorney granted by the individual that is exercisable in relation to decisions about the individual's health; or

(g) a person who has an intimate personal relationship with the individual; or

(h) a person nominated by the individual to be contacted in case of emergency.

2.6 In subclause 2.5:

child of an individual includes an adopted child, a step-child and a foster-child, of the individual.

parent of an individual includes a step-parent, adoptive parent and a foster-parent, of the individual.

relative of an individual means a grandparent, grandchild, uncle, aunt, nephew or niece, of the individual.

sibling of an individual includes a half-brother, half-sister, adoptive brother, adoptive sister, step-brother, step-sister, foster-brother and foster-sister, of the individual.

3. Data quality

An organisation must take reasonable steps to make sure that the personal information it collects, uses or discloses is accurate, complete and up-to-date.

4. Data security

4.1 An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

4.2 An organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed under National Privacy Principle 2.

5. Openness

5.1 An organisation must set out in a document clearly expressed policies on its management of personal information. The organisation must make the document available to anyone who asks for it.

5.2 On request by a person, an organisation must take reasonable steps to let the person know, generally, what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses that information.

6. Access and correction

6.1 If an organisation holds personal information about an individual, it must provide the individual with access to the information on request by the individual, except to the extent that:

- (a) in the case of personal information other than health information—providing access would pose a serious and imminent threat to the life or health of any individual; or
- (b) in the case of health information—providing access would pose a serious threat to the life or health of any individual; or
- (c) providing access would have an unreasonable impact upon the privacy of other individuals; or
- (d) the request for access is frivolous or vexatious; or
- (e) the information relates to existing or anticipated legal proceedings between the organisation and the individual, and the information would not be accessible by the process of discovery in those proceedings; or
- (f) providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations; or
- (g) providing access would be unlawful; or
- (h) denying access is required or authorised by or under law; or
- (i) providing access would be likely to prejudice an investigation of possible unlawful activity; or
- (j) providing access would be likely to prejudice:
 - (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law; or
 - (ii) the enforcement of laws relating to the confiscation of the proceeds of crime; or
 - (iii) the protection of the public revenue; or
 - (iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct; or
 - (v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of its orders;

by or on behalf of an enforcement body; or

(k) an enforcement body performing a lawful security function asks the organisation not to provide access to the information on the basis that providing access would be likely to cause damage to the security of Australia.

6.2 However, where providing access would reveal evaluative information generated within the organisation in connection with a commercially sensitive decision-making process, the organisation may give the individual an explanation for the commercially sensitive decision rather than direct access to the information.

Note: An organisation breaches subclause 6.1 if it relies on subclause 6.2 to give an individual an explanation for a commercially sensitive decision in circumstances where subclause 6.2 does not apply.

6.3 If the organisation is not required to provide the individual with access to the information because of one or more of paragraphs 6.1(a) to (k) (inclusive), the organisation must, if reasonable, consider whether the use of mutually agreed intermediaries would allow sufficient access to meet the needs of both parties.

6.4 If an organisation charges for providing access to personal information, those charges:

(a) must not be excessive; and

(b) must not apply to lodging a request for access.

6.5 If an organisation holds personal information about an individual and the individual is able to establish that the information is not accurate, complete and up-to-date, the organisation must take reasonable steps to correct the information so that it is accurate, complete and up-to-date.

6.6 If the individual and the organisation disagree about whether the information is accurate, complete and up-to-date, and the individual asks the organisation to associate with the information a statement claiming that the information is not accurate, complete or up-to-date, the organisation must take reasonable steps to do so.

6.7 An organisation must provide reasons for denial of access or a refusal to correct personal information.

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7. Identifiers

7.1 An organisation must not adopt as its own identifier of an individual an identifier of the individual that has been assigned by:

(a) an agency; or

(b) an agent of an agency acting in its capacity as agent; or

(c) a contracted service provider for a Commonwealth contract acting in its capacity as contracted service provider for that contract.

7.1A However, subclause 7.1 does not apply to the adoption by a prescribed organisation of a prescribed identifier in prescribed circumstances.

Note: There are prerequisites that must be satisfied before those matters are prescribed: see subsection 100(2).

7.2 An organisation must not use or disclose an identifier assigned to an individual by an agency, or by an agent or contracted service provider mentioned in subclause 7.1, unless:

(a) the use or disclosure is necessary for the organisation to fulfil its obligations to the agency; or

(b) one or more of paragraphs 2.1(e) to 2.1(h) (inclusive) apply to the use or disclosure; or

(c) the use or disclosure is by a prescribed organisation of a prescribed identifier in prescribed circumstances.

Note: There are prerequisites that must be satisfied before the matters mentioned in paragraph (c) are prescribed: see subsection 100(2).

7.3 In this clause:

identifier includes a number assigned by an organisation to an individual to identify uniquely the individual for the purposes of the organisation's operations. However, an individual's name or ABN (as defined in the *A New Tax System (Australian Business Number) Act 1999*) is not an **identifier**.

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8. Anonymity

Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation.

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9. Transborder data flows

An organisation in Australia or an external Territory may transfer personal information about an individual to someone (other than the organisation or the individual) who is in a foreign country only if:

(a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the National Privacy Principles; or

(b) the individual consents to the transfer; or

(c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request; or

(d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or

(e) all of the following apply:

- (i) the transfer is for the benefit of the individual;
- (ii) it is impracticable to obtain the consent of the individual to that transfer;
- (iii) if it were practicable to obtain such consent, the individual would be likely to give it; or

(f) the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the National Privacy Principles.

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10. Sensitive information

10.1 An organisation must not collect sensitive information about an individual unless:

- (a) the individual has consented; or
- (b) the collection is required by law; or
- (c) the collection is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual, where the individual whom the information concerns:
 - (i) is physically or legally incapable of giving consent to the collection; or
 - (ii) physically cannot communicate consent to the collection; or
- (d) if the information is collected in the course of the activities of a non-profit organisation the following conditions are satisfied:
 - (i) the information relates solely to the members of the organisation or to individuals who have regular contact with it in connection with its activities;
 - (ii) at or before the time of collecting the information, the organisation undertakes to the individual whom the information concerns that the organisation will not disclose the information without the individual's consent; or
- (e) the collection is necessary for the establishment, exercise or defence of a legal or equitable claim.

10.2 Despite subclause 10.1, an organisation may collect health information about an individual if:

- (a) the information is necessary to provide a health service to the individual; and
- (b) the information is collected:
 - (i) as required by law (other than this Act); or
 - (ii) in accordance with rules established by competent health or medical bodies that deal with obligations of professional confidentiality which bind the organisation.

10.3 Despite subclause 10.1, an organisation may collect health information about an individual if:

- (a) the collection is necessary for any of the following purposes:
 - (i) research relevant to public health or public safety;
 - (ii) the compilation or analysis of statistics relevant to public health or public safety;
 - (iii) the management, funding or monitoring of a health service; and
- (b) that purpose cannot be served by the collection of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained; and
- (c) it is impracticable for the organisation to seek the individual's consent to the collection; and
- (d) the information is collected:
 - (i) as required by law (other than this Act); or
 - (ii) in accordance with rules established by competent health or medical bodies that deal with obligations of professional confidentiality which bind the organisation; or
 - (iii) in accordance with guidelines approved by the Commissioner under section 95A for the purposes of this subparagraph.

10.4 If an organisation collects health information about an individual in accordance with subclause 10.3, the organisation must take reasonable steps to permanently de-identify the information before the organisation discloses it.

10.5 In this clause:

non-profit organisation means a non-profit organisation that has only racial, ethnic, political, religious, philosophical, professional, trade, or trade union aims.