



Australian  
Competition &  
Consumer  
Commission

# Determination

**Application for revocation of authorisation A40077  
and its substitution by authorisation A90876**

**lodged by**

**the Australian Direct Marketing Association Limited**

*in relation to its:  
2006 Direct Marketing Code of Practice*

**Date: 29 June 2006**

**Commissioners**

Samuel  
Sylvan  
Smith  
King  
Martin  
McNeill  
Willett

**Authorisation no.** A90876  
**File no.** C2003/939

## Executive Summary

The ACCC grants authorisation to the arrangements contained in ADMA's 2006 Direct Marketing Code of Practice until 30 September 2009.

Authorisation is granted on condition that ADMA regularly review its' Code and report their findings to the ACCC.

### The application

On 25 July 2003, the Australian Direct Marketing Association (ADMA) lodged an application with the Australian Competition and Consumer Commission (ACCC) which sought to have authorisation A40077 revoked and replaced by substitute authorisation A90876.

Authorisation A40077 relates to ADMA's Direct Marketing Code of Practice which was authorised by the ACCC in 1999 (the 1999 Code). ADMA initially sought substitute authorisation to replace the 1999 Code with the 2003 Code and for the period of authorisation to be extended. Following a series of amendments in 2004, 2005 and most recently in June of 2006, ADMA is now seeking substitute authorisation to implement its 2006 Direct Marketing Code of Practice (the 2006 Code).

### The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC may also grant an application to revoke an existing authorisation and grant a substitute authorisation when the likely benefit from the conduct proposed to be authorised (that is, under the substitute authorisation) outweighs its possible detriments.

### Assessment of the anti-competitive detriment and public benefit

In assessing the possible detriments to the public of the 2006 Code, the ACCC considers that:

- regulatory developments since ADMA's initial authorisation have reduced the areas in which 2006 Code may impose restrictions beyond those required by legislation
- the loss of/or inability to obtain ADMA membership is unlikely to significantly impede a direct marketers' ability to enter the market or to compete within the industry and
- burdens placed on organisations to comply with the 2006 Code are not significant.

For these reasons, the ACCC is of the view that ADMA's 2006 Code is likely to generate minimal public detriment constituted by a reduction in competition.

### *Public benefits*

Given its objectives, the ACCC maintains the view that ADMA's 2006 Code does have the potential to provide some benefits to the public.

In particular, the ACCC considers that the 'Do not contact' services contained in the 2006 Code are likely to save ADMA members costs that would otherwise be incurred from contacting consumers who are unlikely to acquire their goods or services. The ACCC also considers that there is a benefit in providing consumers with the option not to receive communications from direct marketers where they are not wanted.

In addition, the ACCC considers there is a benefit in requiring ADMA members to have a complainants handling system in place.

Consequently, the ACCC considers that to the extent consumers are aware of the 2006 Code and its members comply with its provisions, these aspects of the 2006 Code are likely to provide a public benefit beyond that which might exist without the authorisation.

The ACCC is concerned however that there is some uncertainty as to whether the review provisions contained in the 2006 Code will ensure it is kept up to date with legislative developments. The ACCC considers that, were the 2006 Code not to reflect legislative requirements, there is some potential for users of the 2006 Code to be misled about their legislated rights and responsibilities. The ACCC considers that the potential for users of the 2006 Code to be misled diminishes the benefits to the public of the ADMA 2006 Code.

In these circumstances the ACCC cannot be satisfied that the benefits of the 2006 Code would be likely to outweigh the detriments to the public constituted by any lessening of competition. However, the ACCC considers that this imbalance may be addressed through the imposition of conditions.

### **Determination**

For the reason outlined in this determination, the ACCC revokes authorisation A40077 and grants substitute authorisation A90876 to allow ADMA:

- (i) to make and give effect to arrangements contained in its 2003 Direct Marketing Code of Practice until 30 September 2006 and
- (ii) to make and give effect to arrangements contained in its 2006 Direct Marketing Code of Practice until 30 September 2009.

The substitute authorisation is granted subject to the conditions outlined in section 9 of this determination.

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# 1. Introduction

## Authorisations

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

## *The authorisation process*

- 1.4. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny an application for authorisation.
- 1.5. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.6. The ACCC then issues a written draft determination proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.7. Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.8. The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received. Should the public benefit outweigh the public detriment, the ACCC may issue a final determination granting authorisation. If not, the ACCC may issue a final determination denying authorisation. However, in some cases it may be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

### ***Revocation and substitution of an authorisation***

- 1.9 Under section 91C of the TPA, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation in its place. In order to do this, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.
- 1.10 In assessing an application made under section 91C of the TPA, the relevant test which must be satisfied for the substitute authorisation to be granted is outlined in section 90(6) of the TPA.
- 1.11 Under section 90(6), the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned were given effect to.
- 1.12 The ACCC also has the power to grant interim authorisation, at the time the application is lodged, or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the ACCC considers and evaluates the merits of the application.
- 1.13 This document is the final determination in relation to the application for revocation and substitution lodged with the ACCC by the Australian Direct Marketing Association Limited (ADMA).

## 2 Background to direct marketing

- 2.1 Broadly speaking, marketing is a group of activities undertaken by companies or individuals which are associated with buying and selling a product or service. Marketing includes activities such as advertising, selling and delivering products to people but may incorporate many other activities.
- 2.2 Generally, marketers try to get the attention of target audiences by using slogans, packaging design, celebrity endorsements and general media exposure.

### *Direct marketing*

- 2.3 Direct marketing is a marketing technique in which the producer or seller of the product bypasses retailers and sells directly to the customer. That is, direct marketing generally involves marketers communicating with a prospective customer, without the use of an intermediary (such as a shopfront).
- 2.4 Direct marketers use a wide range of mediums to contact potential customers which include:
- mainstream methods such as television, radio and newspaper advertising
  - direct mail such as unaddressed printed matter, letters and catalogues
  - telephonic devices such as fax, telephone, SMS and the internet
  - and various others methods including mail order, shopping docketts and exhibitions.
- 2.5 Given this diversity of available mediums, there is also a significant diversity in the level of sophistication among direct marketers and in the amount of effort (and cost) they expend in accurately locating and contacting their target audience.
- 2.6 For example, direct marketers may utilise broad-based, relatively untargeted direct marketing techniques such as unaddressed letter box drops or advertisements in newspaper and on television. However, they may also employ more sophisticated techniques such as using databases that contain the contact details of potential customers. These databases may range from simply containing the customers' addresses or telephone numbers or they may extend to include information on customers' previous purchases, their preferences and financial and demographic status.
- 2.7 Direct marketers who utilise databases of this kind may compile their lists of consumers and their contact details from a wide variety of sources. These include public records, including the white pages, the electoral roll, registers of births, deaths and marriages and land titles registers. Organisations that have their own database of consumers to whom they supply goods or services, for example, telephone companies and other utilities, may also use their database for direct marketing.

- 2.8 Direct marketers may also acquire databases of consumer information from other direct marketers or from companies which specialise in compiling such lists.

*Participants in direct marketing*

- 2.9 Along with having diverse methods of communications and differing levels of sophistication, direct marketing techniques are used and supplied by a diverse range of organisations. These participants in the direct marketing industry may be divided into two broad groups.

*Users of direct marketing services*

- 2.10 Direct marketing techniques are used by many different industry and interest groups including:

- sellers of consumer products
- insurance companies and banks
- legal service providers
- recruitment consultants and travel companies
- research and polling organisations
- community organisations and
- fundraisers and charities.

*Suppliers of direct marketing services*

- 2.11 Suppliers of direct marketing services provide, amongst other things, technical and creative support, goods and services, and include companies involved in:

- computer services and software database management
- delivery and distribution
- electronic media and interactive services and
- telemarketing services mailing lists and mailhouses.

**The Australian Direct Marketing Association (ADMA)**

- 2.12 ADMA is Australia's principal body for information based marketing. Established in 1966 as a non-profit industry body, ADMA represents the collective interests of its members who participate in direct marketing activities. ADMA is based in Sydney but has state branches in New South Wales, Queensland, South Australia, Victoria and Western Australia.

- 2.13 ADMA claims to, amongst other things, conduct advocacy, promotions, education and networking activities on behalf of its members. The prioritising of these activities and ADMA's overall strategic direction are determined by a Board of Directors which is elected by ADMA members, from ADMA members.



- 2.14 ADMA claims to have over 500 corporate members which include organisations from the industries described at paragraphs 2.10 and 2.11. ADMA claims that this represents Australia's largest association for direct marketers and that its members are responsible for over 80 per cent of the \$14.7 billion annual direct marketing media spend in Australia.
- 2.15 ADMA states that its mission is to create an environment for the positive growth of responsible direct and interactive marketing in Australia and that it has developed and administers a Code of Practice to assist in achieving these outcomes.

#### *ADMA's Code of Practice*

- 2.16 The ADMA Code of Practice is a self-regulatory code which sets out specific standards of conduct for participants in direct marketing in relation to their customers and the public. All members of ADMA and their employees, agents, sub-contractors and suppliers of ADMA members are bound by the Code of Practice.
- 2.17 ADMA states that its Code of Practice is also intended to serve as a point of reference for members to ensure they comply with all applicable state and commonwealth legislation.

#### *The ADMA Code Authority*

- 2.18 ADMA states that the ADMA Code Authority is an independent body which was established to enforce and monitor compliance with the Code of Practice. The Code Authority has a range of discretionary powers, including the power to demand undertakings, publish details of offending conduct, recommend that the ADMA Board suspend or expel a member or otherwise impose sanctions.
- 2.19 The ADMA Code Authority also provides recourse to consumers in cases involving alleged breaches of the Code of Practice where they have not been able to resolve their complaint directly with the organisation. The Code Authority may investigate unresolved consumer complaints about ADMA members, and in limited cases, non-member companies. Government agencies receiving complaints about members are able to refer them to the Code Authority for resolution.
- 2.20 The Code Authority is composed of equal numbers of industry and consumer representatives and is chaired by an individual from outside the direct marketing industry. The Code Authority may make recommendations to ADMA on possible changes to its Code of Practice.

#### **Other direct marketing Codes and regulation**

- 2.21 In addition to ADMA there are numerous other bodies that influence or control the direct marketing sector. The most significant of these are described below.

### ***The Ministerial Council on Consumer Affairs Model***

- 2.22 The Ministerial Council on Consumer Affairs (MCCA) consists of all commonwealth, state, territory and New Zealand ministers responsible for fair trading, consumer protection laws and credit laws. The role of MCCA is to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues.
- 2.23 In November 1997, MCCA released its *Direct Marketing: A Model Code of Practice* (the Model Code). The Model Code was designed to deal with some of the problems that had been identified in relation to direct marketing. In September 2003, following a comprehensive review, MCCA released a revised Model Code.

### ***Commonwealth, state and territory fair trading legislation***

- 2.35 The TPA regulates various forms of business conduct which may be engaged in by direct marketers. This includes prohibiting misleading and deceptive conduct, unconscionable conduct, demanding payment for unsolicited goods or services, offering gifts or prizes without intending to provide them and accepting payment without intending or being able to supply as ordered.
- 2.36 These provisions are replicated by state and territory fair trading legislation with some fair trading legislation (such as Victoria and New South Wales) also containing specific provisions dealing with direct marketing. These include making provision for cooling-off rights, formal contract requirements, restricted contact hours and a 'no call back' rule for telemarketing sales of more than \$100.
- 2.37 All State and Territories have door to door selling legislation.

### ***Privacy legislation***

- 2.37 On 21 December 2001, the *Privacy Amendment (Private Sector) Act 2000* extended the *Privacy Act 1988* (the Privacy Act) to the private sector, thus requiring private sector organisations to comply with the National Privacy Principles which set standards for handling of personal information.
- 2.38 The National Privacy Principles regulate the way many private sector organisations collect, use, keep, secure and disclose personal information. The private sector provisions aim to give people greater control over the way information about them is handled in the private sector by requiring organisations to comply with the National Privacy Principles.

### ***Corporations Act –Anti-hawking and cooling off provisions***

- 2.39 In March 2004, the *Corporations Act 2001* was amended to, amongst other things, include a new disclosure regime for most financial products and to establish a standard of conduct for financial services providers. These amendments included provisions relating to the 'hawking' (unsolicited, pressure selling) of financial services and products, and to cooling off periods.

### ***The Spam Act***

- 2.40 Under the *Spam Act 2003* (the Spam Act), which came into effect on 10 April 2004, it is illegal to send, or cause to be sent, 'unsolicited commercial electronic messages' that have an Australian link. A message has an 'Australian link' if it either originates or was commissioned in Australia, or originates overseas but has been sent to an address accessed in Australia.
- 2.41 The Spam Act covers electronic messages – emails, mobile phone text messages (SMS), multimedia messaging (MMS) and instant messaging (iM) – of a commercial nature. The Spam Act does not cover voice or fax telemarketing.

### ***Australian eMarketing Code of Practice***

- 2.42 In response to the Spam Act, the Australian eMarketing Code of Practice (the eMarketing Code) was developed by a committee endorsed by the Australian Communications Authority. The purpose of the eMarketing Code is to provide specific guidance to participants in the eMarketing industry involved in email or mobile marketing, on how current industry practice should be amended to ensure compliance with the Spam Act.

### ***A national 'Do Not Call' register***

- 2.43 On 22 June 2006, legislation to create a national Do Not Call register was passed by the federal parliament. The legislation will allow individuals to list both their home and mobile numbers on a Do Not Call register if they do not want to receive certain unsolicited telemarketing calls. It will then become illegal for telemarketers in both Australia and overseas to contact those numbers.
- 2.44 The legislation also makes provision for the setting of national telemarketing standards on issues such as permitted calling hours and the provision of certain information by telemarketers. These standards will apply to all telemarketers.
- 2.45 The legislated Do Not Call register will be established and overseen by the Australian Communications and Media Authority and is expected to be operational in early 2007.

### **3 ADMA's application and supporting submission**

#### **Authorisation A40077**

- 3.1 On 16 August 1999, the ACCC granted authorisation A40077 to ADMA for its arrangements to adopt a Direct Marketing Code of Practice (the 1998 Code) and to enforce the provisions contained in the 1998 Code. The ACCC granted authorisation in respect of the 1998 Code until 16 August 2003.
- 3.2 A copy of the ACCC's August 1999 determination is available from the ACCC's public register.
- 3.3 In making its decision, the ACCC noted that the 1998 Code contained a number of rules outlining standards relating to telemarketing; electronic commerce; consumer data protection; and fair trading. The ACCC formed the view that these rules had the potential to give rise to a number of public benefits in so far as they:
- provided consumers with rights additional to those provided for by legislation
  - protected consumers from unreasonable intrusive forms of direct marketing
  - protect consumers' right to privacy and
  - provided consumers with recourse to a dispute resolution mechanism.
- 3.4 The ACCC however considered that the extent to which the 1998 Code would in practice be likely to benefit the public depended upon the level of compliance with the rules it established.
- 3.5 In this respect the ACCC had a number of concerns with the structure and operation of the 1998 Code's enforcement provisions including the independence and accountability of decision-making bodies; the remedies available; and the complaints handling process. The ACCC therefore requested that a number of amendments be made to the enforcement provisions of the 1998 Code.
- 3.6 The authorisation was also subject to a number of additional conditions which essentially required ADMA to keep the 1998 Code up to date with regulatory developments.

#### **ADMA's application for revocation and substitution**

- 3.7 On 25 July 2003, ADMA lodged an application with the ACCC which sought to have authorisation A40077 revoked and substituted by authorisation A90876 (the 2003 Code). In addition, ADMA sought interim authorisation for its proposed substitute authorisation.
- 3.8 On 13 August 2003, ADMA was granted interim authorisation for its 2003 Code. This effectively suspended the original authorisation A40077 and granted immunity to the substitute arrangements while the ACCC considered ADMA's substantive application.

- 3.9 Since lodging its initial application, ADMA has amended its Code of Practice on a number of occasions. This redrafting and the resulting public consultation processes have lead to a number of delays in the ACCC's assessment of the application.
- 3.10 This determination relates to the most recent version of ADMA's Code (the 2006 Code), a copy of which is appended to this determination and marked as Attachment 1.

***Overview of the 2006 Code***

- 3.11 ADMA submits that the proposed 2006 Code establishes specific standards of conduct for participants in the direct marketing industry in relation to their customers and the public. All members of ADMA and their employees, agents or sub-contractors are currently bound by the 2003 Code.
- 3.12 ADMA submits that in the event that substitute authorisation is granted, its members and their employees, agents, sub-contractors and suppliers to ADMA members will be bound by the terms of the 2006 Code.
- 3.13 ADMA states that the objectives of the 2006 Code are to:
- ensure business and consumers have access to the product and service information they need to make informed choices
  - minimise the risk of members breaching the Privacy Act, the Spam Act, the TPA or any relevant state fair trading legislation
  - promote a culture among members of conducting their businesses fairly, honestly, ethically and in accordance with best practices and
  - increase business and consumer confidence in doing business with ADMA members.
- 3.14 The 2006 Code is divided into nine parts the most significant of which are:

<i>Part C – Marketing Claims</i>	Covers topics relating to the dissemination of information and conditions of direct marketing transactions, including: misleading or deceptive conduct; false claims; cancellation and refunds; unordered goods or services; and responding to a complaint.
<i>Part D – Fair Conduct Relevant to Telemarketing</i>	Outlines standards of fair conduct specifically in respect of telemarketing, including information required to be disclosed at the earliest opportunity and on request and permitted calling times.
<i>Part E – Fair Conduct relevant to EMarketing and ECommerce</i>	Covers standards in respect of email marketing and online transactions.
<i>Part F – Fair Conduct Relevant to Mobile Marketing</i>	Applies to organisations involved in marketing via mobile wireless technology.

<i>Part G – Fair Conduct Relevant to Consumer Data Protection</i>	Reflects statutory obligations imposed on private sector organisations by the NPP's under the Privacy Act. The NPP's are reproduced at Annexure 1.
<i>Part H – Respecting Consumer Preference</i>	Outlines standards in respect of suppression files. This part outlines ADMA's Do Not Contact services.
<i>Part I – Enforcement</i>	Refers to ADMA's ability to enforce the 2006 Code.
<i>Part J – Code Review and Amendment</i>	Provides that the 2006 Code be subject to independent review on a regular basis.

***ADMA's submission in support of its application***

- 3.15 ADMA submits that its 2006 Code is a response to a need to provide customers and potential customers with safeguards to protect their interests. ADMA states that in the absence of a Code of Practice, its members will lack guidance as to responsible and appropriate conduct which may result in harm to the direct marketing industry.

*Public Benefit*

- 3.16 ADMA claims that the public benefits identified in authorisation A40077 were manifest and will continue to result from the proposed arrangements. In particular ADMA claims that the 2006 Code will:

- promote and enhance consumer protection by:
  - ensuring consumers have access to the product and service information they need to make informed choices
  - respecting privacy at a higher level than the minimum legal requirement and
  - promoting a culture among direct marketers of conducting their businesses fairly, honestly, ethically and in accordance with best practices
- ensure members put in place the best possible complaint handling procedures along with providing consumers with a flexible complaints handling procedure in relation to alleged breaches of the Code by ADMA members
- provide responsible development of the direct marketing industry which will, amongst other things, promote competition and market efficiency
- promote equitable dealings in the direct marketing industry and
- improve the quality and consistency of the service received by consumers from direct marketers.

*Anti-competitive detriment*

- 3.17 ADMA acknowledges that some of the arrangements in the 2006 Code have the potential to restrict competition and may therefore generate anti-competitive detriments. These include:
- the conduct of ADMA members is restricted beyond that required by relevant state, territory and commonwealth legislation
  - the imposition of sanctions (including the revocation of membership) where a member of ADMA is found to be in breach of the 2006 Code and
  - the imposition of sanctions against the member where an agent or subcontractor of the member is found to be in breach of the 2006 Code.
- 3.18 ADMA contends that the level of anti-competitive detriment likely under the 2006 Code is less than was the case in the original application because of the introduction of legislation such as the private sector amendments to the Privacy Act and the anti-hawking provisions of the Corporations Act.
- 3.19 A further potential anti-competitive detriment identified by ADMA is the potential for standardisation in the way in which participants in the direct marketing industry conduct their business and engage in trade. ADMA considers that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another and, as such, may be anti-competitive.
- 3.20 However, ADMA contends that restrictions on the conduct of its members is directed more towards promoting the interests of consumers than the prevention of competition between members and that the availability of sanctions for a breach of the 2006 Code is directed at encouraging compliance without unduly burdening ADMA members.

*Period for which authorisation is sought*

- 3.21 ADMA submits that it is seeking authorisation for a period of five years.

## **4 The ACCC's consultation process and draft determination**

- 4.1 As mentioned, since its initial application for revocation and substitution, ADMA has revised its Code on a number of occasions. Consequently, the ACCC has conducted three separate public consultation processes, two prior to issuing its draft determination and one following its draft determination.
- 4.2 Summaries of interested party submissions from each of these three processes are appended to this determination and marked as Attachment 2.

### **The ACCC's draft determination**

- 4.3 On 12 October 2005, the ACCC issued a draft determination in respect of ADMA's application for revocation and substitution.

#### *Assessment of the anti-competitive detriments*

- 4.4 The ACCC stated that in considering the possible detriments to the public that may result from the lessening of competition:
- the loss of/or inability to obtain ADMA membership was unlikely to significantly impede a direct marketers' ability to enter the market or to compete within the industry
  - the level of anti-competitive detriment likely to flow from the existence and enforcement of the ADMA Code was significantly lessened due to the current legislative obligations which existed regardless of ADMA's Code and
  - it was not likely that burdens placed on organisations to comply with ADMA's Code would result in any significant anti-competitive detriment.

- 4.5 Overall, the ACCC was of the view that detriments to competition likely to result from ADMA's Code would be minimal.

#### *Assessment of the public benefits*

- 4.6 The ACCC considered that, as a general principle, an industry code responding to and appropriately addressing concerns about direct marketing had the potential to result in significant benefits to the public. The ACCC was concerned however, that, in this instance, interested parties submissions indicated that there was wide spread concern that ADMA's Code did not go far enough in protecting consumers and could be more strongly enforced.
- 4.7 The ACCC noted that while ADMA had made a number of key improvements to its Code, it nonetheless agreed with interested parties that further improvements in a number of key areas would improve the effectiveness of ADMA's Code and would be likely to result in greater benefits to the public than currently arise.



### *Overall assessment*

- 4.8 Overall, the ACCC considered that the ADMA Code continued to provide consumers with some rights and avenues additional to those that were granted at law and continued to provide consumers with recourse to a resolution mechanism where they have complaints regarding the conduct of an ADMA member.
- 4.9 On balance, the ACCC considered that the ADMA Code was likely to result in some benefits to the public and that the corresponding detriments to competition resulting from the ADMA Code were likely to be minimal.
- 4.10 The ACCC did note that while on balance it did consider there was a net public benefit arising from ADMA's Code, it did not consider the Code to be faultless. However, the ACCC also noted that it was not its role to design, or insist upon, the development of an ideal code of conduct and it is constrained in this respect by its statutory duty.

### *Draft determination*

- 4.11 The ACCC proposed granting the revocation of A40077 (the 1998 Code) and its substitution by authorisation A90876 for a period of three years.

### **The pre-determination conference**

- 4.12 On 14 November 2005, a pre-determination conference was held in response to the ACCC's draft determination. A list of attendees and a summary of the major issues raised at the conference are appended to this determination and marked as Attachment 3.

### **ADMA submissions**

- 4.13 Throughout the course of the ACCC's assessment, ADMA lodged a number of submissions in addition to the one contained with its initial application.
- 4.14 On 4 May 2005, ADMA lodged a submission in response to issues raised by interested parties *prior* to that date.
- 4.15 On 6 June 2006, ADMA provided a further submission responding to the ACCC's draft determination and to a number of concerns raised by interested parties. This submission also included the current version of ADMA's Code.
- 4.16 A summary of ADMA's submissions is appended to this determination and is marked as Attachment 4.

## **5 ACCC assessment – Relevant market and counterfactual**

- 5.1 ADMA has sought authorisation to make a contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or might have the effect, of substantially lessening competition within the meaning of the TPA; and to give effect to that provision.
- 5.2 The ACCC's evaluation of this application is made in accordance with section 90(6) of the TPA.
- 5.3 Under section 90(6), the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned were given effect to.
- 5.4 Again the ACCC notes that it is limited to determining whether the provisions of ADMA's 2006 Code are likely to result in a benefit to the public that is sufficient to outweigh any likely anti-competitive detriment. It is not the ACCC's role in the authorisation process to design, or insist upon, the development of an ideal code of conduct and it is constrained in this respect by its statutory duty.
- 5.5 In order to assist in making an assessment of the public benefits and anti-competitive detriments of the proposed arrangements, the ACCC must first make an assessment, to the extent necessary, of any relevant market(s) and form a view as to the potential counterfactual.

### **ACCC assessment - Relevant market(s)**

- 5.6 In its consideration of this application, the ACCC considers that it is not necessary to fully define the scope of the relevant markets as the proposed arrangements will apply whatever definition is adopted.
- 5.7 In respect of the product market, the ACCC notes that it could be defined as wide so as to include all marketing and sales services or a subset thereof.
- 5.8 In respect of the geographic market, the ACCC considers it to be nationally based. However, the ACCC also notes that some forms of direct marketing communication are potentially limitless and borderless in their reach to consumers. One of the main characteristics of the direct marketing industry is the lack of face to face contact between buyers and sellers.

- 5.9 Therefore, for the purpose of assessing the current application, the ACCC considers the relevant area of competition to be that of the marketing and sale of goods and services in Australia.

**ACCC assessment - Future with-or-without**

- 5.10 In order to identify and measure the public benefit and anti-competitive detriment generated by the conduct for which authorisation is sought, the ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The ACCC will compare the public benefit and anti-competitive detriment that will result in the future if authorisation is granted with the counterfactual.
- 5.11 In this instance, the ACCC is of the view that the most likely situation if the authorisation is denied (the counterfactual) is one in which ADMA would amend its Code to reduce any potential contravention of the TPA.
- 5.12 The ACCC considers that if this were to occur, the most likely changes would be to provisions of the Code which impose requirements which are in addition to those required by the legislative regimes. It is also likely that ADMA would amend those provisions which impose sanctions on members for non-compliance with the Code.
- 5.13 The ACCC does not consider that these two classes of provisions would necessarily be removed from a revised Code, but it is considered more likely that they will be lessened to some degree. In these circumstances ADMA would continue to provide guidance and assistance to its members in respect of their compliance with the Code.

## 6 ACCC assessment – Anti-competitive detriments

- 6.1 In order to grant authorisation to the conduct proposed by ADMA, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.
- 6.2 On the basis of submissions submitted by ADMA and interested parties, the ACCC considered the following potential anti-competitive detriments in its draft determination:
- the effect of ADMA membership on a business' ability to compete
  - the impact on the direct marketing industry
  - the conduct beyond that required by commonwealth, state and territory legislation
  - the burden on members to comply with the Code and
  - standardisation of the way in which members conduct their business.
- 6.3 These issues are again considered by the ACCC in this determination. Where relevant they take into account further submissions received from interested parties and issues raised at the pre-determination conference.

### *The effect of ADMA membership on a business' ability to compete*

- 6.4 The ACCC is of the view that the purpose of an industry code of conduct should be to improve the efficiency of business and strengthen the confidence of consumers in that industry. Adherence to a recognised code of conduct can constitute an important selling point for businesses to attract new customers and may increase the bargaining power of the business when entering into arrangements with other parties.
- 6.5 A number of interested parties have submitted that non-membership of ADMA may affect a business' ability to compete in the direct marketing industry, particularly where an organisation has their membership withdrawn. It has been claimed that such action may place that organisation at a commercial disadvantage as:
- some ADMA members refuse to deal with non-ADMA members
  - some third parties prefer to deal only with ADMA members
  - there are some reputational advantages to belonging to ADMA and
  - there are general benefits of belonging to an industry association with a high profile for political lobbying.

- 6.6 While ADMA has acknowledged these concerns, it considers that the restrictions imposed by the 2006 Code are directed more towards promoting the interests of consumers than the prevention of competition between members.
- 6.7 The ACCC considers that the imposition of sanctions (including the revocation of membership of ADMA) may be detrimental to the sanctioned member. This detriment may arise as a result of customers and/or other ADMA members being less likely to deal with the organisation. The organisation may also be denied access to the advocacy, education and networking activities conducted by ADMA.
- 6.8 However, the ACCC notes that there are other organisations to which participants in the direct marketing industry may belong to, for example: Direct Sellers Association of Australia, Australian Teleservices Association, Market Research Society of Australia, Association of Market Research Organisations, Internet Industry Association and the Fundraising Institute of Australia.
- 6.9 The ACCC considers it likely that these organisations would offer similar benefits to their members to those offered by ADMA. More generally, the ACCC notes that membership of ADMA is not a pre-condition of participation in the direct marketing industry.
- 6.10 Given this, the ACCC considers it unlikely that the loss of/or inability to obtain ADMA membership would significantly impede a direct marketer's ability to enter the market or to compete within the industry. In this respect the ACCC understands that the decision of a significant direct marketing organisation to withdraw from ADMA has not significantly impacted upon its business.

*Impact on direct marketing industry*

- 6.11 ADMA claims that, should authorisation not be granted, an anti-competitive detriment will arise from reduced consumer confidence in the direct marketing industry. ADMA submits that, in the absence of its code, its members would lack guidance as to responsible and appropriate conduct which may result in harm to the direct marketing industry.
- 6.12 The ACCC accepts that the adoption of an industry code can provide guidance as to appropriate standards of behaviour and conduct for industry participants. This issue is considered further in the ACCC's discussion of public benefits.

*Conduct beyond that required by Commonwealth, State and Territory legislation*

- 6.13 In its submission supporting its application, ADMA states that the level of anti-competitive detriment possible under its revised Code would be less than was the case under the 1998 Code. ADMA claims that this is primarily due to the amendment of Acts such as the Privacy Act and the Corporations Act. ADMA submits that as these amendments have served to increase the regulatory requirements of industry participants they have in turn reduced the gap between the requirements of the ADMA Code and legislation.

- 6.14 ADMA submits however that the revised Code is still relatively prescriptive in relation to certain non-legislative requirements placed on its members.
- 6.15 The ACCC notes that when ADMA's 1998 Code was authorised there were significantly fewer regulatory requirements on direct marketing participants than exist today. The ACCC is of the view that the regulatory developments since that time, such as those identified by ADMA, have served to reduce the areas in which ADMA's Code may impose restrictions beyond those required by legislation.
- 6.16 However, as noted below, the ACCC does consider that there are a number of areas in which ADMA's revised Code may still prescribe conduct beyond that required by legislation.
- 6.17 The ACCC considers it appropriate for self-regulatory codes to replicate or exceed legislative requirements if they encourage better practice and behaviour from industry members. In this regard, the ACCC considers that in those areas where ADMA's Code does exceed legislative requirements, this appears to be the intention.

*Burden for members*

- 6.18 It was submitted by interested parties that code compliance and membership of ADMA impose a number of burdens on direct marketers, in particular in the form of additional expenditure and annual membership fees. While it has not addressed this issue specifically, ADMA has submitted that the availability of sanctions for a breach of the 2006 Code is directed at encouraging compliance with that Code without unduly burdening ADMA members.
- 6.19 Having considered the information contained in the submissions, the ACCC does not consider annual membership fees are likely to be overly burdensome and/or significant in relation to an organisation's annual gross revenue. The ACCC also notes that ADMA membership is not compulsory for participants in the direct marketing sector such that any additional expenses could be avoided if considered unnecessary by a business.
- 6.20 Further, many of the Code's provisions are already required under various Commonwealth, State and Territory legislation. Accordingly, the ACCC considers that compliance with the ADMA Code is unlikely to be significantly more onerous or burdensome for an organisation than generally complying with legislation and conducting business in a professional and courteous manner.
- 6.21 Finally, following the draft determination it was submitted that the revised Code provisions dealing with allowable calling hours place New South Wales based charities at a competitive disadvantage as compared to other charities in other states. The ACCC understands that the argument is based on the interaction of the revised Code provisions with the provisions of the New South Wales *Charitable Fundraising Regulations*.

- 6.22 The ACCC raised this issue with ADMA who responded by further amending its code. These and other amendments are discussed further at paragraphs 7.12 – 7.15 below.

*Standardising the way in which members conduct their business*

- 6.23 ADMA submits that its revised Code may have the potential to standardise the way in which participants in the direct marketing industry conduct their business and engage in trade. It submits that such standardisation may limit the opportunities for ADMA members to differentiate their businesses from one another.
- 6.24 The ACCC recognises that ADMA's Code requirements may promote a degree of standardisation in the way in which participants in the direct marketing industry conduct certain aspects of their business and may, to a degree, limit innovation amongst members.
- 6.25 However, the ACCC does not consider the requirements of ADMA's Code go beyond standards which are widely accepted as prudent and fair business practices. In addition, there is no restriction on direct marketing organisations to self-adhere to higher standards and practices than those prescribed by ADMA's Code.

**Conclusion on anti-competitive detriment**

- 6.26 Overall, for the reasons outlined above, the ACCC is of the view that ADMA's 2006 Code is likely to generate minimal public detriment constituted by a reduction in competition.

## **7 ACCC assessment – Public benefits**

### *Authorisation A40077*

- 7.1 In assessing ADMA's original application for authorisation (A40077) in 1999, the ACCC formed the view that ADMA's Code had the potential to give rise to a number of public benefits in so far as it:
- provided consumers with rights additional to those provided for by legislation
  - protected consumers from unreasonable intrusive forms of direct marketing
  - protected consumers' right to privacy and
  - provided consumers with recourse to a dispute resolution mechanism.
- 7.2 The ACCC however considered that the extent to which the 1998 Code would in practice be likely to benefit the public depended upon the level of compliance with the rules it established.
- 7.3 ADMA has submitted that the public benefits identified in relation to the 1998 Code are manifest and will continue to result from the proposed arrangement. However, a number of interested parties have expressed concern that, since the original grant of authorisation, the ADMA Code has not resulted in any real benefit to consumers.

### *Draft determination*

- 7.4 In its draft determination, the ACCC stated that as a general principle it considered that an industry code which responded to and appropriately addressed concerns about direct marketing had the potential to result in significant benefits to the public.
- 7.5 Specifically, the ACCC recognised that there were a number of characteristics of the direct marketing industry, such as a consumer's lack of opportunity to inspect goods prior to purchasing, which gave rise to the potential for unethical conduct within the industry.
- 7.6 The ACCC was therefore of the view that there was potential for a public benefit to arise from the existence and enforcement of the ADMA's Code of Practice.
- 7.7 The ACCC also stated that it considered that determining whether a public benefit would actually flow from ADMA's Code would depend on factors such as:
- its responsiveness to changing circumstances
  - the requirements upon members which are in addition to those imposed by legislation and
  - the administration of the Code.
- 7.8 These factors are again considered by the ACCC in this determination and, where relevant, take into account the further submissions received from interested parties and the issues raised at the pre-determination conference.



### *Responsiveness of the Code*

- 7.9 The ACCC is of the view that in order for an industry code to continue meeting its identified objectives it is essential for that code to be responsive to environmental developments such as legislative changes or changes in community expectations. The ACCC considers that such responsiveness is most likely to be achieved by regular review and scrutiny of the codes provisions.
- 7.10 In this respect, ADMA's Code provides that it 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. The Code also requires that, in conducting a review of the Code, the review body should, where appropriate, consult with groups affected by the Code.
- 7.11 The ACCC notes that ADMA's Code has evolved significantly from the originally authorised 1998 Code. This evolution has, in part, been in reaction to consultation by the ACCC with stakeholders and in response to some legislative developments.

#### *ACCC draft determination and subsequent submissions*

- 7.12 In its draft determination and in subsequent correspondence, the ACCC expressed concern that the review provisions of ADMA's Code fail to provide certainty to interested parties that the ADMA Code would remain in step with a changing environment. The ACCC was concerned that, to the extent the ADMA Code does fail to respond in a timely way to such changes, this may result in a detriment to the public.
- 7.13 For example, following the draft determination, interested parties raised the following concerns in relation to the code's failure to achieve ongoing currency with legislative developments:
- Consumer Affairs Victoria expressing concerns that the provisions provided for by the 2005 Code dealing with allowable calling hours and cooling off periods offer less than what is provided for in the Victorian *Fair Trading Act 1999*
  - ASIC expressed concern that certain provision of the 2005 Code, in particular those contained in Part D (*Fair conduct relevant to telemarketing*) and Part H (*Respecting Consumer Preference*), do not meet the requirements of the *Corporations Act* and
  - the Office of the Privacy Commissioner (the OPC) raising concerns about the removal from the 2005 Code of the full text extract of the National Privacy Principles.

*ADMA's responses to concerns*

- 7.14 On June 6 2006, ADMA advised the ACCC that it had resolved these concerns by making the following amendments to its Code:

*Fair Conduct Relevant to Telemarketing (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. A footnote has also been added to this section to highlight that state-based telemarketing laws currently exist in New South Wales and Victoria.
- 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 only apply in the absence of applicable Federal or State legislation.

*Fair Conduct Relevant to Consumer Data Protection (Part G)*

- Section 1: This section has been amended 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.

- 7.15 In addition, ADMA stated that it would not be opposed to a condition being included in the authorisation which required ADMA to conduct an annual, independent audit of the Code to ensure it continued to accurately reflect legislation.

***ACCC consideration***

- 7.16 The ACCC is of the view that in order to provide a public benefit, ADMA's Code must, at a minimum, accurately reflect existing legislation and establish a mechanism to ensure that it continues to do so.
- 7.17 The ACCC considers that the amendments which ADMA has made to its Code following the ACCC's draft determination are sufficient to ensure that the existence of higher legislative requirements in certain areas is brought to the Code user's attention. The ACCC also considers that ADMA's commitment to having its Code independently audited annually is likely to ensure that this compliance is on-going.
- 7.18 However, the ACCC considers that were this on-going compliance not to occur, concerns relating to the Code's potential to mislead ADMA members and the public may re-surface and may lead to a significant reduction in the accepted public benefit. For the reasons outlined below the ACCC proposes to address this concern through the imposition of conditions.

### ***Requirements on members in addition to those established by legislation***

- 7.19 As with the 1998 Code, the ACCC considers that the level of public benefit resulting from the 2006 Code is linked largely to those standards or requirements which go beyond those already imposed by legislation.
- 7.20 That is, if ADMA's Code merely replicates existing legislation it is less likely to generate public benefits beyond that which already exists from the legislation. However, if ADMA's Code requires higher standards of its members than are required by legislation, that may generate some public benefits beyond those required by legislation.

### ***Concerns raised by interested parties***

- 7.21 A number of interested parties expressed concerns that ADMA's Code does not require industry practice and standards that are significantly beyond those already required by legislation and in some instances fall below those standards.
- 7.22 Interested parties have also expressed concern that ADMA's Code fails to achieve uniform coverage of direct marketing providers and that unscrupulous direct marketers are unlikely to be members of ADMA.
- 7.23 Interested parties have also expressed concern that the Code is poorly promoted and few consumers are aware that it exists.

### ***ACCC consideration***

- 7.24 The ACCC considers that ADMA's 2006 Code does impose a number of standards or requirements on members which either complement or go beyond the legislation and which may deliver a public benefit.
- 7.25 However, the ACCC is of the view that the size or weight attributable to those public benefits should have regard to, the level of industry coverage to the Code and the level of consumer awareness of the Code.
- 7.26 In respect of the adherence to, and coverage of, the ADMA Code, the ACCC notes that all employees, agents, sub-contractors and suppliers of ADMA members (of which ADMA claims to have over 500) are bound by ADMA's Code. This, in effect, extends the coverage of the Code beyond simply ADMA members.
- 7.27 Additionally, the ACCC considers that as it would appear to be in ADMA's interest to represent all direct marketers operating in Australia, ADMA has a clear incentive to seek to continually grow its membership base and coverage of its Code.
- 7.28 The ACCC is therefore of the view that whilst ADMA's Code may not (and its unlikely will ever) be used by the entire direct marketing industry, the Code is likely to have relatively wide coverage.

- 7.29 In respect of consumer awareness of the Code, the ACCC notes that, while not an accurate measure, the number of complaints reported as having been received by the Code Authority appears significantly lower than the number of direct marketing related complaints received by other agencies, including the ACCC itself. The ACCC considers that this suggests that consumers may be unaware of the alternate avenues of recourse available to them under the ADMA Code and therefore unaware of ADMA's Code itself.
- 7.30 That said, the ACCC does consider the Code has the potential to generate some benefits from its *Respecting Consumer Preferences* and *Complaints handling* provisions.

*Respecting Consumer Preferences*

- 7.31 Section H of the 2006 Code contains ADMA's *Respecting Consumer Preferences* provisions which include its 'Do not contact' services.
- 7.32 ADMA's 'Do not contact' service requires members that send marketing communications to operate and maintain a suppression file. The suppression file must list recipients who have indicated that they do not wish to receive further marketing communications from that member. The member is required to remove that recipient from their database.
- 7.33 ADMA's do not contact provisions also include an ADMA operated 'Do Not Mail' and 'Do Not Call' service. This service allows consumers to inform ADMA that they do not wish to be contacted by any of its members. ADMA members must use this service when conducting a direct marketing campaign.
- 7.34 The ACCC considers that ADMA's do contact services may provide benefits in two ways.
- 7.35 Firstly, the ACCC considers that ADMA's do not contact services are likely to save its members the costs that would otherwise be incurred from contacting consumers who are unlikely to acquire their goods or services.
- 7.36 Secondly, the ACCC considers that there is a benefit in providing consumers with the option not to receive communications from direct marketers where they are not wanted. Such a service, while unlikely to be as comprehensive as the proposed legislated 'do not call' register, assists to protect consumer from unwanted and unsolicited contact from the direct marketing industry.
- 7.37 While the ACCC considers that ADMA's Code may be able to provide similar provisions without authorisation (i.e. in the counterfactual), the effectiveness and enforceability of such provisions may be diminished if, as discussed in the counterfactual, the sanctions available under the Code were lessened.
- 7.38 Consequently, the ACCC considers that to the extent consumers are aware of ADMA's *Do not contact services* and its members comply with its provisions, this aspect of ADMA's Code is likely to provide a public benefit beyond that which might exist without the authorisation.

- 7.39 The ACCC notes that the national Do Not Call legislation passed by federal parliament on 22 June 2006 may affect the weight given to this benefit. However, the ACCC considers that as ADMA's provisions go beyond telephone contact to include postal contact, its broader Do Not Contact services are likely to continue providing some benefit.

*Complaints handling provisions*

- 7.40 Section C of the 2006 Code contains ADMA's *Marketing Claims* provisions which include its 'Responding to a complaint' requirement.
- 7.41 ADMA's Code requires that members have in place a system for dealing with customer complaints which complies with Australian Standard 4269.<sup>1</sup> This includes having a designated person to deal with complaints and responding to complaints within five working days.
- 7.42 The ACCC considers that it is beneficial for both consumers and the direct marketing industry for ADMA members to be required to have a complainant's handling system in place. Benefits of such a requirement may flow from more transparent and efficient handling of potentially costly complaints.
- 7.43 Again, the ACCC considers that while ADMA may still include similar provisions without authorisation, their effectiveness is likely to be diminished. Therefore the ACCC considers that ADMA's *Complaints handling* provisions may generate some additional public benefit beyond that which might exist without the authorisation.

*Other provisions*

- 7.44 ADMA's 2006 Code contains a number of other provisions which impose requirements on members that exceed existing legislation. These include:

*Automated dialling equipment:* The Code contains requirements for the use of automatic dialling equipment including imposing time limits.

*Information to be provided at the time of offer and at the time of delivery:* The Code sets out information which must be provided by a supplier at the time of offer and at the time of delivery.

*Delivery and payment:* The Code describes procedures for its members relating to the delivery and payment of goods or services.

*Fair conduct relevant to telemarketing:* The Code places specific obligations on its members when they are conducting telemarketing campaigns. This includes matters such as line disconnection times, calling frequency and the use of random dialling equipment.

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<sup>1</sup> Australian Standard on Complaints Handling AS 4269-1995

### *Conclusion*

- 7.45 The ACCC accepts that ADMA's Code may provide some public benefits insofar as it imposes requirements on members which go beyond those required by legislation and appears to have relatively wide spread coverage. However, the extent of this benefit is limited by the apparent lack of consumer awareness of the Code.

### *Administration of the Code*

- 7.46 Administration of an industry code may include such things as interpreting, enforcing and amending the code. The ACCC considers that strong, independent and transparent administration of an industry code is likely to engender confidence in that code such that industry participants see a benefit in complying with it.
- 7.47 As noted previously, the ADMA Code is enforced and monitored by the ADMA Code Authority. The Code Authority has a range of discretionary powers, including the power to demand undertakings, publish details of offending conduct, recommend that the ADMA Board suspend or expel a member or otherwise impose sanctions.
- 7.48 The ADMA Code Authority also provides recourse to consumers in cases involving alleged breaches of the Code where they have not been able to resolve their complaint directly with the organisation. The Code Authority may also investigate unresolved consumer complaints about ADMA members, and in limited cases, non-member companies.
- 7.49 The Code Authority is composed of equal numbers of industry and consumer representatives and is chaired by an individual from outside the direct marketing industry.
- 7.50 A number of concerns have been raised by interested parties concerning certain aspects of the Code Authority including: the transparency of its activities and; its enforcement of the Code.

### *Transparency and independence of the Code Authority*

- 7.51 Interested parties have raised concerns about the actual and/or perceived independence of the Code Authority from ADMA. For example, it has been submitted that the Code Authority is not required to disclose certain matters relating to the independence of its members, such as how they are selected or the nature of their contracts.
- 7.52 In addition, it has been claimed that no minutes of meetings are made public and there is no public disclosure of communication between the Code Authority and ADMA.
- 7.53 The ACCC notes that the Code Authority is required to publish an annual report covering a range of matters, including the number of complaints received and an analysis of enforcement action. However, the ACCC considers that significantly

more could be done by ADMA to make the activities of the Code Authority more accessible and transparent to interested and affected parties.

- 7.54 The ACCC considers that to the extent that the Code Authority is perceived to lack transparency and independence and this leads to a reduction in confidence in the administration of ADMA's Code, the overall public benefits associated with the Code may be lessened.

#### *Code enforcement*

- 7.55 ADMA's Code establishes a range of sanctions which may be enforced where the Code Authority finds a member to be in breach of the Code. These sanctions may include corrective advertisements, refunds and/or revocation of membership.
- 7.56 Interested parties have raised concerns that the enforcement provisions of ADMA's Code have been weakly, and seldom, enforced. In particular interested parties have submitted that as there does not appear to be adequate consequences for not adhering to the Code, the Code regime is vulnerable to the disengagement of parties (members) when even mild sanctions are proposed.
- 7.57 The ACCC accepts that, while significantly limiting the potential effectiveness of the Code, a dissatisfied ADMA member should be able to resign their ADMA membership. The ACCC considers this to be an important and inherent feature of any voluntary code.
- 7.58 However, the ACCC reiterates its view that the apparent limited consumer awareness of the Code coupled with the apparent preparedness of businesses to forgo their ADMA membership if faced with sanctions would appear to undermine the effectiveness of the Code.

#### **Conclusion on public benefits likely to result from the ADMA Code**

- 7.59 Overall the ACCC maintains the view that ADMA's 2006 Code has the potential to provide some benefits to the public. In particular, the ACCC considers that these benefits may arise from the ADMA's 'do not contact' services and the requirement for members to have a complaints process in place.
- 7.60 However, as noted the ACCC does have some concerns that these public benefits may be diminished if the Code is not kept up to date with legislation.

## **8 Balance of public benefits and anti-competitive detriment**

- 8.1 In order to grant authorisation to the conduct proposed in ADMA's application for revocation and substitution, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the proposed arrangements.
- 8.2 In relation to anti-competitive detriment, the ACCC is of the view that ADMA's 2006 Code is likely to generate minimal public detriment constituted by the lessening of competition.
- 8.3 In relation to public benefits, the ACCC maintains the view that, given its objectives, ADMA's 2006 Code has the potential to provide some benefits to the public. In particular, the ACCC considers that insofar as the Code requires members to utilise 'do not contact' services and have a complaints process in place the Code is likely to produce a benefit.
- 8.4 The ACCC is concerned however that there is uncertainty as to whether the review provisions will ensure the Code is kept up to date with legislative developments. The ACCC considers that, were the Code not to reflect legislative requirements, there is potential for its users to be misled about their rights and responsibilities. The ACCC considers that this potential may diminish the benefits to the public of the ADMA Code.
- 8.5 In these circumstances the ACCC can not be satisfied that the benefits of the Code would be likely to outweigh the detriments to the public constituted by any lessening of competition.

### **Conditions**

- 8.6 The ACCC considers that the limitations of the Code's review provisions may be addressed through the imposition of conditions. The ACCC accordingly proposes to grant authorisation subject to the following conditions:

**C1: The ADMA Direct Marketing Code of Practice must reflect where relevant legislative requirements pertaining to direct marketing practices.**

**C2: ADMA must conduct regular internal reviews of the Direct Marketing Code of Practice to ensure that condition C1 of this determination is complied with.**

**C3: ADMA must obtain an annual assessment of the findings of its internal review(s) from an appropriately qualified independent legal adviser.**



**C4: ADMA must report to the ACCC by 30 September each year, with the first report to be provided by 30 September 2007. In its report ADMA must detail:**

**(i) the matters identified by the review(s)**

**(ii) the outcome of the independent assessment and**

**(iii) the proposed response, if any, to those matters identified by the review process.**

8.7 The annual reporting requirements of the review provisions set out above do not preclude ADMA from conducting Code reviews at any time. In particular the ACCC would expect that ADMA would conduct a review of the Code provisions in response to significant legislative developments whenever they occur.

#### **Period of authorisation**

8.8 ADMA is seeking authorisation for a further five years. ADMA claims that the successful operation of the Code, the relatively low level of complaints, the ability of the Code and Code Authority to adapt to a fast changing technological environment and the lack of any demonstrated lessening of competition since the original authorisation justify an extended period of authorisation. ADMA has also noted that, should substitute authorisation be granted, a transitional period of three months to enable the implementation of the 2006 Code, thereby replacing the 2003 Code, would be appropriate.

8.9 In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is actually made eventuate in practice and the appropriateness of the authorisation in the current market environment.

8.10 On balance the ACCC considers that it is appropriate to grant authorisation to the substitute arrangements for a three year period. This will allow the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which this decision has been made have eventuated and to consider the appropriateness of the authorisation in the (then) current market environment.

8.11 The ACCC notes that, given the review mechanism outlined above and the potential for significant legislative developments affecting the direct marketing industry, it is likely that the ADMA Code will require amendment during this period of authorisation. The ACCC notes that sections 91A and 91C of the TPA make provision for variations to be made to authorisations.

## 9 The determination

### The Application

- 9.1 On 25 July 2003, Australian Direct Marketing Association (ADMA) lodged an application pursuant to section 91C of the *Trade Practices Act 1974* (the TPA) for a revocation of authorisation A40077 and its substitution by authorisation A90876.
- 9.2 ADMA's application was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and
  - (b) to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 9.3 On 13 August 2003, ADMA was granted interim authorisation. This effectively suspended the expiration of authorisation A40077 and granted ADMA immunity to give effect to its 2003 Direct Marketing Code of Practice while the ACCC considered ADMA's substantive application.
- 9.4 Since lodging its initial application, ADMA has amended its Direct Marketing Code of Practice on a number of occasions. This determination relates to the June 2006 Direct Marketing Code of Practice, a copy of which is appended to this determination and marked as Attachment 1.

### The Statutory Test

- 9.5 For the reasons outlined in this determination the ACCC is not satisfied that the revocation of authorisation A40077 and its substitution by authorisation A90876:
- would be likely to result in a benefit to the public and
  - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the proposed arrangements.
- 9.6 The ACCC considers however that, subject to the conditions set out below, the test under section 91C (7) would be likely to be met by the ADMA arrangements.

## **Conduct authorised**

9.7 The ACCC revokes authorisation A40077 and grants substitute authorisation A90876 to allow ADMA:

- (i) to make and give effect to arrangements contained in its 2003 Direct Marketing Code of Practice until 30 September 2006 and
- (ii) to make and give effect to arrangements contained in its 2006 Direct Marketing Code of Practice until 30 September 2009.

9.8 The substitute authorisation is granted subject to the following conditions:

**C1: The ADMA Direct Marketing Code of Practice must reflect where relevant legislative requirements pertaining to direct marketing practices.**

**C2: ADMA must conduct regular internal reviews of the Direct Marketing Code of Practice to ensure that condition C1 of this determination is complied with.**

**C3: ADMA must obtain an annual assessment of the findings of its internal review(s) from an appropriately qualified independent legal adviser.**

**C4: ADMA must report to the ACCC by 30 September each year, with the first report to be provided by 30 September 2007. In its report ADMA must detail:**

- (i) the matters identified by the review(s)**
- (ii) the outcome of the independent assessment and**
- (iii) the proposed response, if any, to those matters identified by the review process.**

### *Date authorisation comes into effect*

9.9 This determination is made on 29 June 2006. If no application for review is made to the Australian Competition Tribunal, authorisation A90876 will come into effect on 21 July 2006.

9.10 ADMA's interim authorisation continues to protect ADMA's 2003 Direct Marketing Code of Practice until the date this determination comes into effect or until a decision to revoke interim authorisation is made.

## **Attachment 1 - ADMA Code of Practice, June 2006**

# 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 sweepstakes***<sup>1</sup>

- 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*.

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<sup>1</sup> 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 intended<sup>2</sup>; and

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<sup>2</sup> *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 legislation<sup>3</sup> 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 marketing<sup>4</sup>.
- 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.

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<sup>3</sup> Financial Services Reform Act 2001

<sup>4</sup> 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 call<sup>5</sup>.
- 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

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<sup>5</sup> *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 legislation<sup>6</sup>; 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 pm<sup>7</sup> 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 (26<sup>th</sup> 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 an 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**

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<sup>6</sup> 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.

<sup>7</sup> 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 3<sup>rd</sup> 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 messagesmust 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 a 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.



## **Attachment 2 – Interest party submissions**

The ACCC conducted two rounds of interested party consultation prior to issuing its draft determination in October 2005. The ACCC then conducted a further interested party process in relation to the 2005 Code after issuing its draft determination.

During the course of these processes the ACCC has received submissions from the following interested parties:

- Council of Small Business Organisations of Australia Ltd
- Australian Capital Territory Department of Justice and Community Safety
- Attorney-General's Department
- South Australian Office of Consumer and Business Affairs
- New South Wales Office of Fair Trading
- Office of the Federal Privacy Commissioner
- Queensland Government, Department of Tourism, Racing and Fair Trading
- Consumers' Federation of Australia
- Financial Services Consumer Policy Centre
- Consumer Credit Legal Centre (NSW) Inc
- Robin Whittle – First Principles
- Consumer Affairs Victoria
- Australian Consumers' Association
- Consumer Law Centre Victoria
- Australian Securities and Investments Commission
- Royal Institute for Deaf and Blind Children
- Fundraising Institute of Australia

An outline of the key issues raised in these submissions is provided below. Full copies of all public submissions are available from the ACCC's public register.

### **Comments from interested parties received prior to the draft determination**

#### *Anti-competitive detriments*

The FSCPC and the CLC Victoria raised the following issues in respect of anti-competitive detriments:

- some ADMA members refuse to deal (eg through procurement contracts) with non-ADMA members
- some third parties prefer to deal only with ADMA members and
- there are some alleged reputational advantages of belonging to ADMA.

FSCPC submitted that because of these matters, non-membership of ADMA may place a direct marketing company at a commercial disadvantage.

The FSCPC submitted that there is some evidence that Code compliance and membership of ADMA do represent a cost burden for direct marketers.

The ACT DJCS noted that the focus of the ADMA Code appears to be on promoting good consumer relations between consumers and ADMA members, rather than preventing competition between industry participants.

CAV submitted that, ADMA's Code of Practice had the potential to standardise the way in which participants in the direct marketing industry conduct their business, may set a de facto standard for direct marketers and may inhibit innovation.

The ACA submitted that as the Code is ineffectual and lightly enforced, the anti-competitive strength of the Code is weak and insufficient to require authorisation.

#### *Public benefits*

Generally, interested parties raised concerns that since the original authorisation the ADMA Code has not resulted in any real benefit to consumers.

CAV stated it was concerned that ADMA's Code does not go far enough to protect consumers from intrusive and unfair practices by direct marketers.

DJCS submitted that benefits which flow from the Code include increased confidence in the direct marketing industry, access to dispute handling mechanisms, the application of sanctions against ADMA members who infringe against the Code and consumer representation on the Code Authority.

The CFA submitted that to achieve any public benefit, a Code must at a minimum have broad industry coverage, be effectively monitored and enforced and raise industry standards above those generally provided for in legislation. The CFA considered that the ADMA Code fails at least on the last two points.

#### *Effectiveness/industry coverage*

The FSCPC expressed doubts that ADMA has significant industry coverage in outbound telemarketing and spam and noted that there are numerous other industry associations which specifically cover aspects of direct marketing, including telemarketing and spam.<sup>2</sup>

The CFA submitted that it appears that many organisations that cause problems for consumers are not ADMA members. The FSCPC also submitted that small business does not appear to be well represented in ADMA's membership.

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<sup>2</sup> Direct Sellers Association of Australia, Australian Teleservices Association, Association of Market Research Organisation, Internet Industry Association and Fundraising Institute of Australia.

CAV submitted that the language and terminology used in the Code is vague and provides little guidance to direct marketers and fails to set objective and clear Code rules.

#### *Enforcement & monitoring*

DJCS submitted that the ADMA Code should be appropriately enforced in order to ensure that the protection provided to consumers by the ADMA Code is not illusory. It was noted by the FSCPC that one ADMA member cancelled its membership of ADMA after the ADMA Code Authority decided to pursue compliance related sanctions, and that no further action against the company was possible.

The CFA stated that enforcement of the Code by ADMA is ineffective in part due to the low number of complaints received by ADMA and the ability of companies to resign from ADMA if they don't like ADMA's decision.

CAV submitted that the Code fails to establish a regime whereby the conduct of direct marketers is being rigorously monitored to ensure business standards are being adhered to.

The ACA stated that the 2004 Code regime is vulnerable to the disengagement of parties when even mild sanctions are proposed. The ACA submitted that this compounds the problem of limited industry coverage. Furthermore, the ACA submitted that there is not a hugely compelling necessity to subscribe to the 2004 Code and not a particularly threatening consequence to unsubscribing.

#### *Independence of the Code Authority*

Concerns were raised about the independence of the Code Authority. Robin Whittle submitted that the Code Authority is a private function within ADMA and that there is no public disclosure of matters which are related to the independence of the Code Authority members such as how they are selected; what they are paid; the length of nature of the contracts they are on; non-disclosure agreements regarding their interaction with ADMA and its members; and no minutes of meetings or public disclosure of communication between the Code Authority and ADMA.

#### *Lack of consumer awareness*

The FSCPC noted that ADMA is only receiving 30 to 40 complaints each year and that no other consumer Code in recent Australian experience has been the subject of fewer complaints or managed to achieve such a low profile with members of the public. The FSCPC noted that there is evidence that direct marketing continues to be the subject of a large number of complaints to other regulatory agencies.

It was noted by DJCS that various State Privacy Commissioners are receiving a significant number of complaints about the practices of direct marketing industry participants which might indicate that there is a large number of consumers who are unaware of ADMA's existence and where a complaint can be lodged.

The CFA submitted that a reasonable level of complaints is usually required in order to adequately monitor a Code. The CFA stated that it considers that the small number of complaints is due to the lack of awareness of the ADMA Code rather than lack of consumer concerns.

### *Inconsistencies with legislation*

The FSCPC submitted that ADMA's position on 'allowable' hours represents the lowest possible consumer privacy standard for all attempts in Australia relating to the regulation of telemarketing. The FSCPC further noted that residents of New South Wales and Victoria will both have greater protection than that offered by the Code and enforceable through legislation. The CLC Victoria supported this view.

OFPC submitted that there are some provisions in the Code which differ from the obligations contained in the NPPs in ways that may cause some confusion or contradiction.

Concerns in respect of the part of the Code relating to fair conduct relevant to consumer data protection were also raised by the Queensland Fair Trading) who suggested that the legislative language reproduced in that part of the Code is not easily understood.

CAV also expressed concern that the 2004 Code does not make any reference to the requirements relating to unfair terms in consumer contracts contained in *Fair Trading Act 1999 (Vic)*.

The ACA submitted that the Code embodies a standard of behaviour that is rapidly falling behind industry, consumer and legislative benchmarks.

The APF submitted that alternative contact details such as email and fax should be provided in respect of the lodgement of complaints as there is no reason for a 2004 Code to require complaints to be lodged by postal mail only.

The ACA and submitted that an unintended endorsement effect may flow from authorisation of the 2004 Code whereby consumers may perceive that the ACCC is endorsing the 2004 Code.

### **Comments from interested parties received after the draft determination**

#### *Australian Securities and Investments Commission*

The ASIC has noted that in its view a code of conduct should do more than just restate legal obligations. In particular ASIC has submitted that a code should address specific industry or consumer issues which are not otherwise covered by legislation. ASIC has noted that a code should also provide guidance as to how a particular industry should comply in practice with legislation.

In respect of the ADMA Code, ASIC has expressed concern that the Code fails to satisfy the requirements of the *Corporations Act 2001*, specifically in respect of the anti-hawking and cooling off provisions. While noting the disclaimer provided by paragraph 12 of the ADMA Code, ASIC has expressed concern that the provisions of the Code do not meet the requirements of the *Corporations Act*.

More generally, ASIC has noted that public benefits will be limited if a code is not seen to set best standards of practice or, at least, to set standards that exceed existing legal requirements.

#### *Consumer Affairs Victoria*

CAV has expressed strong concern that industry codes, such as the ADMA Code, should adopt standards that go beyond legislative standards. While noting that the ADMA Code

goes beyond legislative requirements in some areas, CAV has submitted that the ADMA Code does not meet its concerns in a number of areas, including:

- Part C largely traverses matters already provided for by legislation
- the cooling-off rights provided for offer less than the Victorian *Fair Trading Act 1999*
- the procedure to be followed by members when goods cannot be delivered within the stipulated time is to the benefit of members, not consumers
- the current provisions of the Code dealing with commercial communications directed to minors misses the point – being that minors cannot legally enter into contracts for the sale of goods or services and
- the provisions of the Code dealing with allowable calling hours are inconsistent with the provisions of the Victorian *Fair Trading Act 1999*

*Office of the Privacy Commissioner*

The OPC submits that in its view the benefits to the public of the ADMA Code are linked to the extent to which the Code accurately and clearly reflects the privacy rights of individuals and the extent to which the Code expands upon these rights. While noting that the 2005 Code provides some improvements upon the 2003 and 2004 Codes, the OPC is nonetheless concerned that by removing the full text of the National Privacy Principles (NPPs) the clarity of the 2005 Code has been reduced. The OPC submits that the full text of the NPP should be reinserted.

*Royal Institute for Deaf and Blind Children*

The RIDBC operates a call centre engaged in charitable fund raising. RIDBC notes that, due to the provisions of the *Charitable Fundraising Regulations 2003 (NSW)*, charitable organisations in NSW are required to adhere to the allowable calling hours established by the ADMA Code.

Under the current ADMA Code the RIDBC's call centre is permitted to operate between the hours of 9.00am and 9.00pm in New South Wales. RIDBC has expressed concern that under the proposed 2005 Code the allowable calling hours will be reduced to 9.00am to 8.00pm.

According to RIDBC this reduction in allowable calling hours would reduce their opportunities to raise funds by 8% and would significantly impact upon their ability to fund services.

RIDBC has also submitted that the effect of the ADMA provisions dealing with allowable calling hours is to place New South Wales based charities at a competitive disadvantage as compared to other charities in other states. RIDBC submits that this is an anti-competitive detriment of the ADMA Code.

*Fundraising Institute of Australia*

The FIA provided a submission endorsing the concerns expressed by RIDBC.

*Financial Services Consumer Policy Centre*

The FSCPC submits that the ADMA Code suffers from a number of deficiencies, including:

- coverage – ADMA lacks sufficient coverage of the telemarketing sector to be the appropriate body to perform a regulatory function.
- public awareness of ADMA, the Code and the Code Authority continues to be reflected in the low level of complaints considered by the Code Authority
- ADMA does not adopt a leadership/best practice role in respect of direct marketing consumer issues in Australia
- ADMA has failed to engage a independent party to conduct reviews of the Code, despite this being a requirement of authorisation and
- ‘do not call register’ – despite several years of operation, ADMA’s do not contact service is under utilised by both consumers and telemarketing organisations.

The FSCPC has submitted that non-membership of ADMA may result in some anti-competitive detriment, including:

- while access to the ADMA ‘do not call’ register is available to non-members, the cost differential for access (vis-à-vis members) may create a barrier to entry
- the unwillingness of consumers to subscribe to more than one ‘do not contact’ list creates a anti-competitive effect, favouring the first mover (ADMA)
- some ADMA members refuse to deal with non-ADMA members and
- there are some qualifications and training packages linked exclusively to ADMA membership.

#### *Australian Privacy Foundation*

The APF endorses the submissions made by the FSCPC. APF has expressed particular concern that ADMA and the Code Authority have failed to monitor and report upon the operation of the Code. APF has also expressed concern that visibility and coverage of the ADMA ‘do not contact’ lists is extremely limited.

#### *Robin Whittle, First Principles*

Mr Whittle has submitted that the ACCC should not grant authorisation to the ADMA Code noting that:

- authorisation would result in the public perception that authorisation confers government approval
- the level of protection offered by ADMA is minimal – particularly with respect to telemarketing
- ADMA has demonstrated a low level of performance in operating its Code Authority and in reporting upon its functions
- the operations / effectiveness of the ADMA do not contact suppression lists has never been independently audited and reported upon and
- ADMA has been unresponsive to recommendations made by the Code Authority.

## Attachment 3 – Pre-determination conference

On 14 November 2005, a pre-determination conference was held in response to the ACCC's draft determination. The following organisations were represented at the conference:

Australian Direct Marketing Association	Ms Jodie Sangster
Direct Marketing Code Authority	Mr John Wood Mr Bill Dee Mr Richard Watson Mr Robin Brown
First Principles	Mr Robin Whittle
Fundraising Institute-Australia Ltd	Ms Sue-Anne Wallace
Office of the Privacy Commissioner	Mr Andrew Solomon
Royal Institute for Deaf and Blind Children	Mr Frank Antonini
Financial Services Consumer Policy Centre	Mr Chris Connolly

The major issues raised at the conference were as follows:

**Bill Dee** stated that in his view the anti-competitive detriments of the Code are low, if any, and are offset by the public benefits of the Code.

**Frank Antonini** submitted that generally speaking, fundraisers supported the Code; however, concerns have been raised in relation to allowable calling hours. In particular, 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. In terms of competition, NSW charities would be placed at a disadvantage when compared to other state based charities if the Code were authorised.

**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.

**Robin Whittle** submitted that ACCC authorisation is seen by the public as 'government approval' of ADMA as the self regulator for the direct marketing industry. Further, 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').

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.

**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.

**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 Wood** stated that, in relation to enforcement of the Code, the period in which the Code Authority had been operating, there had only been one instance where the use of sanctions was considered.

**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.

**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.

**Chris Connolly** that the ADMA Code is unpopular among consumer and privacy advocates. This is primarily due to its provisions relating to telemarketing. 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.

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' and; consumer advocates have raised concerns regarding the lack of independent review of the Code, despite this being a condition of the last authorisation.



## Attachment 4 – ADMA response to interested parties

*May 2005*

On 4 May 2005, ADMA lodged a submission in response to issues raised by interested parties regarding its 2004 Code. A full copy of ADMA's responding submission is available on the ACCC's public register.

ADMA stated that it represents the direct marketing industry and that this consequently does not extend to direct selling practices. Direct marketing is distinct from direct selling in that direct marketing does not involve face-to-face contact with the consumer. ADMA noted that the Direct Selling Association of Australia represents organisations that use direct selling techniques and they have their own code of practice that applies to member companies.

ADMA state that it is inaccurate to conclude that the number of organisations subscribing to the ADMA Do Not Contact files equals the number of organisations that use the files. All ADMA members are required, as a condition of membership, to screen against the Do Not Contact register before undertaking an unsolicited marketing campaign.

ADMA noted that a large proportion of member companies will engage the services of a bureau to undertake this screening on its behalf. ADMA submitted that it is therefore the bureau that will subscribe to the Do Not Contact Files not the individual organisation. A data bureau will conduct these services on behalf of numerous ADMA members.

ADMA submitted that it has taken into account the introduction of both the NSW direct commerce provisions and the amendment to the Victorian Fair Trading legislation through by inserting a warning to members of differing State telemarketing legislation and expressly requires compliance with such laws.

*June 2006*

On 6 June 2006 ADMA provided a further submission in response to concerns raised in interested party submissions and at the pre-decision conference. ADMA submits that the following amendments to its Code should be sufficient to eliminate concerns raised by interested parties:

- **Part D, Section 1:** This section has been amended to include a reference to applicable Federal telemarketing legislation, such as the Financial Services Reform Act 2001.
- **Part D, Section 1:** A footnote has been added to this section to highlight that telemarketing laws currently exist in NSW and Victoria.
- **Part D, Section 20:** This section has been amended to clarify that a member must adhere to calling hours set out in Federal or State legislation and that the calling hours set out in the ADMA Code of Practice only apply in the absence of applicable Federal or State legislation.
- **Part G, Section 1:** An amendment has been made to this section to include a reference to Annex 1, which includes 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, ADMA submits that it would be comfortable with a condition requiring it to review and update its Code on an on-going basis.