



14 March 2008

Mr Robert Fitzgerald
Presiding Commissioner
Review of Australia's Consumer Policy Framework
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2616

Also via email: consumer@pc.gov.au

Dear Mr Fitzgerald

The Australian Direct Marketing Association (ADMA) welcomes the opportunity to make this submission in response to the Productivity Commission's (PC) inquiry into Australia's consumer policy framework and in particular ADMA seeks to respond to the recommendations put forward by the Commission in its Review of Australia's Consumer Policy Framework Draft Report.

ADMA is the peak association of the Australian direct marketing industry and represents over 500 member organisations including major financial institutions, telecommunication companies, energy providers, travel service companies, major charities, statutory corporations and specialist suppliers of direct marketing services.

According to recent CEASA research¹ 715,385 Australians were employed in the direct marketing industry in 2006 and it had revenues of \$12.8 billion pa.

However, direct marketing is even more important to Australian business and the national economy than these statistics would imply.

Virtually every Australian company and not-for-profit organisation directly markets to its current and potential customers as a normal and legitimate part of its business activities.

¹ Commercial Economic Advisory Service of Australia report Direct Marketing in Australia 2006.

Direct Marketing Regulatory Overview

ADMA defines direct marketing as:

“Using the most effective marketing channels to create and build profitable one to one relationships between brands and customers”.

Those marketing ‘channels’ include the internet; wireless mobile devices; fixed line phone and fax; and addressed mail.

The ‘relationships’ between brands and customers encompass acquisition, retention and loyalty programs focusing on customer service and consumer choice.

This direct marketing activity is regulated by a spectrum of Federal, State and Territory legislation, legislative instruments, co-regulatory codes of practice and self-regulatory industry guidelines – few of which contain consistent definitions or are harmoniously applicable or applied across the nation’s jurisdictions.

Direct marketing is regulated by the following Commonwealth Acts.

- *Disability Discrimination Act 1992.*
- *Do Not Call Register Act 2006.*
- *Financial Services Reform Act 2001.*
- *Privacy Act 1988.*
- *Spam Act 2003.*
- *Telecommunications Act 1997.*
- *Trade Practices Act 1974.*

It is also regulated by State & Territory Fair Trading and Consumer Protection Acts.

Further, it is regulated by industry co-regulatory and self-regulatory codes and guidelines including the following.

- The ADMA *Direct Marketing Code of Practice* developed in consultation with the Ministerial Council of Consumer Affairs (MCCA) and ratified by the Australian Competition & Consumer Commission (ACCC) under auspices of the *Trade Practices Act*.
- The *eMarketing Code of Practice*, developed in consultation with the Australian Communications & Media Authority (ACMA) under the *Telecommunications Act*.
- The *mMarketing Code of Practice*.
- ADMA’s suite of Industry best practice guidelines in the use of data; the operation of contact centres; the conduct of chance draws and prize competition promotions; and the conduct of list rental agreements.

ADMA Advocates Consumer Protection

ADMA insists on honesty and fairness in all customer dealings and ADMA's codes and guidelines set standards of industry best practice and ethical conduct.

ADMA's members take these codes and guidelines extremely seriously and compliance with the Direct Marketing Code of Practice, eMarketing Code and mMarketing Code is mandatory.

These codes are administered by the independent Direct Marketing Code Authority (Code Authority) which is chaired by Mr John Wood, a former Deputy Commonwealth Ombudsman, Director of the Federal Bureau of Consumer Affairs, and President of the Society of Consumer Affairs Professionals (SOCAP).

Its four other members include two well respected consumer advocates and two experienced and knowledgeable industry representatives.

ADMA's Response to the Commission's Draft Recommendations

Recommendation 3.1

ADMA broadly supports this recommendation, with reservations in regard to 'operational objective' four, being:

"The consumer policy framework should efficiently and effectively aim to – meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage".

ADMA strongly disagrees with proposals that require direct marketers to make assessments in regard to an individual's capacity.

It may be impossible to make assessments of this type through the vast majority of direct marketing communications.

Even if a subjective assessment is able to be made, then the issue then turns to what level of disadvantage, vulnerability or incapacity leads to the different treatment of an individual consumer to that of another.

ADMA would also add that further operational objectives should apply.

Australia's consumer policy framework should also be:

- technologically neutral;
- equitably applied across industry sectors;
- consistent with international standards; and should
- encourage legitimate business activity and investment.

Recommendation 4.1

ADMA broadly supports this recommendation, yet puts forward the opinion that the harmonisation of consumer law nationally may only be Constitutionally viable through

the introduction of identical 'template' or 'mirror' fair trading legislation in each State and Territory following the model of the Uniform Consumer Credit Code.

Recommendation 4.2

ADMA broadly supports this recommendation but makes no comment in regard to the issue of financial disclosures.

Recommendation 4.3

ADMA makes no comment.

Recommendation 4.4

ADMA broadly supports this recommendation and considers that it might ensure national consistency in the interpretation and enforcement of consumer protection law, however, it also points out the Constitutional and practical difficulties of all State & Territory jurisdictions referring their enforcement powers to the Commonwealth.

Recommendation 5.1

ADMA strongly supports this recommendation, with the reservations in regard to point three as outlined above.

ADMA also takes this opportunity to welcome the incoming Federal Government's recognition of the importance of consumer protection law and hopefully the importance of national consistency with the appointment of Assistant Treasurer & Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP.

ADMA would further suggest that Minister Bowen and the Department of the Treasury take an active role along with the Council of Australian Governments (COAG), the Standing Committee of Attorneys-General (SCAG), and the Ministerial Council of Consumer Affairs to urgently address the issue of harmonisation.

Recommendation 5.2

ADMA makes no comment.

Recommendation 5.3

ADMA makes no comment.

Recommendation 5.4

ADMA makes no comment.

Recommendation 5.5

ADMA makes no comment.

Recommendation 6.1

ADMA agrees with this recommendation and notes that the Federal Government has already moved part way in making portfolio responsibility for consumer policy at the national level more visible, as mentioned above.

Recommendation 6.2

ADMA makes no specific comment, except to note that the MCCA has proved to be totally ineffectual over a number of years in ensuring legislative harmonisation and the creation of a consistent national consumer law framework.

This is further evidenced by recent and mooted changes in consumer law regarding telephone marketing in the Australian Capital Territory through its *Regulatory Services Legislation Amendment Bill 2007* and in the Northern Territory through its *Consumer Affairs and Fair Trading Amendment Act 2006*, and discussion about possible amendments to South Australia's *Fair Trading Act 1987*.

In regard to telephone marketing there are still material and persistent differences between the New South Wales *Fair Trading Act 1987* and the Victorian *Fair Trading Act 1999*, that ADMA has brought to the attention of both governments and the MCCA on numerous occasions.

Indeed the Commonwealth's *Telecommunications (Do Not Call Register) (Telemarketing & Research Calls) Industry Standard 2007* has brought some national consistency to telephone marketing laws, yet ADMA believes that it too ignored the opportunity to impose national consistency through its *Do Not Call Register Act* by declining to ensure that the legislation 'covered the field'.

Recommendation 7.1

ADMA broadly supports this recommendation with reservations, particularly in regard to 'safe harbour' contract terms and the recommendation that the provision be reviewed in five years.

Recommendation 8.1

ADMA broadly supports this recommendation.

Recommendation 8.2

ADMA makes no comment.

Recommendation 8.3

ADMA makes no comment.

Recommendation 9.1

ADMA supports this recommendation.

Recommendation 9.2

ADMA has no issue with the purview of the Telecommunications Industry Ombudsman (TIO) being broadened to include all telecommunication premium content services, however, ADMA cannot agree that the TIO should regulate pay TV and other undefined “associated services and hardware”.

Recommendation 9.3

ADMA broadly supports this recommendation.

Recommendation 9.4

ADMA makes no comment.

Recommendation 9.5

ADMA broadly supports this recommendation.

Recommendation 9.6

ADMA broadly supports this recommendation.

Recommendation 10.1

ADMA broadly supports this recommendation.

Recommendation 10.2

ADMA broadly supports this recommendation.

Recommendation 11.1

ADMA broadly supports this recommendation as it incorporates current direct marketing industry best practice, with the exception of the recommendation that addresses mandatory disclosure requirements in financial services on which ADMA makes no comment.

Recommendation 11.2

ADMA broadly supports this recommendation, though it would not appear to be of the highest priority.

Recommendation 11.3

ADMA makes no comment, other than to say that technology is rapidly reducing information asymmetry between organisations and suppliers and that better informed consumers are empowered consumers. The methods through which consumers are informed or inform themselves is less material as long as the information is accessible and reliable.

Inherent Inconsistency in Commonwealth Consumer Law

While the Productivity Commission's Review of Australia's Consumer Policy framework has focused on inconsistencies between State, Territory and Federal laws, it is important to point out that there are material inconsistencies in Commonwealth legislation that affects consumers.

Definitional differences regarding consumer consent and ill-defined references to a consumers' 'reasonable expectations' and 'existing customer relationship' with an organisation are fraught with operational difficulties for Australian business.

Some of these issues have been ventilated through the Australian Law Reform Commission's Privacy Review, however, they would also appear to be germane to the Productivity Commission's inquiry.

Conclusion

Organisations that undertake direct marketing are currently subject to different and conflicting State, Territory and Federal laws depending on the jurisdiction their current and prospective customers are located in; the marketing channels through which that communication is made; and the industry sector that organisation operates in.

These material differences create considerable confusion, substantial operational burdens and significant compliance costs. Ultimately these costs and burdens are borne by consumers and employees.

ADMA strongly recommends that a single, harmonised framework of consumer law be established as a matter of urgency.

Marketing to existing and prospective customers is an essential and legitimate business activity and the only way that organisations can meet the needs of consumers by offering them the most up to date, appropriate and cost effective products and services.

In conclusion, ADMA again thanks the Commission for the opportunity to take part in this inquiry and we would be pleased to discuss any aspect of this submission in more detail.

Yours sincerely



Rob Edwards
Chief Executive Officer