



Developing Telecommunications Codes for Registration – A Guide



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INTRODUCTION

This guide has been designed to assist industry bodies in writing industry codes for registration with the Australian Communications Authority (ACA) under Part 6 (Industry codes and industry standards) of the *Telecommunications Act 1997* (the Act). It outlines the ACA's approach and procedures in relation to the codes which are presented to it by industry bodies for registration, either voluntarily, or following a request to develop a code by the ACA under section 118 of the Act. It is also intended as a general guide for consumers as to the criteria that registered telecommunications industry codes must meet. This guide is not a substitute for the Act and is intended to be read in conjunction with Part 6 of the Act.

The ACA is available to provide advice on codes at any stage during the process of code development, prior to an industry body applying for registration. Industry bodies seeking ACA advice are encouraged to approach the ACA as early as possible. It should be noted, however, that this advice is provided without prejudice to a subsequent Authority decision on registering a code and the Authority reserves the right to exercise its powers under the Act to refuse a registration application for a code on which it has been consulted.

Attached to this guide are forms for substantiating consultation and applying for code registration with the ACA. These two forms should be used when making an application to the ACA for registration of a code. Copies of the forms may be obtained from the ACA. This guide and the forms are also on the ACA website at www.aca.gov.au/telcomm/industry_codes/codes/guides.htm.

Outline of Part 6 – Industry codes and industry standards

Among the objects of the Act are the promotion of the long-term interests of end-users of telecommunications services, the efficiency and international competitiveness of the Australian telecommunications industry and the greatest practicable use of industry self-regulation. Part 6 of the Act provides a key plank of the industry self-regulatory regime through a scheme of industry codes.

Industry codes can be developed by telecommunications industry bodies on any matter which relates to a telecommunications activity. This is defined very widely in section 109 of the Act. Codes can be presented by industry bodies to the ACA for registration and where the ACA is satisfied that the code meets stipulated criteria it is obliged to include the code on a register of industry codes and industry standards. This register is required under section 136 of the Act as a publicly accessible record of all registered codes.

The ACA may also remove or de-register industry codes or provisions of industry codes from the Section 136 Register under section 122A of the Act. Industry bodies may apply to the ACA to de-register a code or, alternatively, this process may be initiated by the ACA.

Where the ACA considers a code to be necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of the telecommunications industry, it may request that a representative industry body develop one and present it to the ACA for registration. In the event that the code is not developed, or does not meet the registration criteria, the ACA may develop an industry standard, compliance with which is mandatory.

The benefits of code registration

An industry body is not obliged to register a code with the ACA. However, registration of a code on the ACA Section 136 Register has three important benefits.

In the first place registration provides legislative support for the enforcement of the code. Although, under normal circumstances, compliance by industry participants with a registered code is voluntary, when a code is entered on the register the ACA may employ its safety net powers under sections 121 and 122 to ensure compliance. These powers enable the ACA to issue formal warnings to industry participants regarding breaches of the code and also to direct industry participants to comply with the provisions of a code where the code has been, or is being, contravened.

Registration also ensures that a code which follows the ACA's registration process covers all industry players, not just those who are members of the industry body. ACA warnings and directions to comply with a

registered code can be issued to any participant in a section of the industry which is contravening the code, whether or not that participant has voluntarily agreed to comply with the registered code or is a member of the industry body that developed the code. A breach of an ACA direction to comply may attract civil penalty provisions. With the backing of the ACA's powers under the law, registered codes will effectively have industry wide coverage.

Registration of a code by the ACA is an acknowledgment that the code has been independently assessed as meeting important regulatory criteria in the industry and consumer matters it covers. In order to be registered by the ACA, a code must be evaluated on a series of legislatively prescribed measures. In deciding whether codes meet these requirements the ACA is obliged to ensure that public interest considerations are addressed without imposing undue financial and administrative burdens on the telecommunications industry. The ACA's registration process ensures that registered codes provide objectively assessed, uniform rules for conduct across the telecommunications industry.

Privacy codes

Since 21 December 2001, the Privacy Commissioner has been able to approve privacy codes which incorporate the National Privacy Principles under Part IIIAA of the *Privacy Act 1988* (the Privacy Act) following a written application for approval to the Privacy Commissioner. Hence, these codes are not appropriate for registration by the ACA. However, the ACA may still register codes which deal with other privacy matters such as directories and the intrusive use of telecommunications. These codes are referred to in this guide as 'telecommunications privacy codes'.

Industry bodies must consult with the Privacy Commissioner on telecommunications privacy codes under paragraph 113(3)(f) of the Act. Any code dealing with the personal information of customers, whether or not it is predominantly a telecommunications privacy code, will require consultation with the Privacy Commissioner. In addition, the ACA is obliged to consult the Privacy Commissioner on codes submitted for registration which deal with matters related to the National Privacy Principles or a code approved under the Privacy Act.

DRAFTING THE CODE

Code drafting principles

In addition to the specific requirements of sections 112 and 117 of the Act, there are a number of generic code drafting principles which must be followed when drafting a code. An outline of these principles is included at

Appendix D. Drafting is a specialised skill and industry bodies may find that codes are easier to write if a qualified legal drafter is used.

Code ‘appropriateness’

Paragraph 117(1)(d) of the Act requires that the ACA must be satisfied that, where the code deals with matters of substantial relevance to the community, the code provides ‘appropriate community safeguards’ and where it deals with other matters, that it does so in an ‘appropriate manner’. These decisions must be made by the ACA in the context of the public interest balance test. The kinds of matters codes must address and the safeguards they must provide in order to satisfy the ACA that they are ‘appropriate’ include:

- consistency with legislation;
- enforceable provisions;
- for consumer codes, rules that enable the effectiveness of the code to be demonstrated;
- performance benchmarks for measuring compliance;
- full and proper consultation; and
- full administration of the code including implementation mechanisms, complaints handling processes, compliance monitoring and sanctions provisions.

These matters are further elaborated in the remainder of this chapter. A summary of the requirements of this chapter is contained at Appendixes D and E to assist industry bodies in drafting codes to meet the requirements of section 117 of the Act.

Scope

The code must clearly state:

- the name of the code;
- the name of the industry body which is initiating and administering the code;
- the date of commencement of the code; and
- the section or sections of the telecommunications industry to which the code applies. This is particularly important to enable the ACA to use its powers of direction under section 121. Under this section, the ACA must be satisfied that a code applies to participants in the particular section of the telecommunications industry. The ACA will only be able to enforce codes which clearly apply to a stated section or sections of the industry.

Section 120 of the Act requires that codes may not be amended, but must be replaced in their entirety. If the code is intended to replace a code already registered on the Section 136 Register, this must also be clearly stated.

Objectives

Codes must address specified telecommunications activities. The code must state what issues it is designed to address and what it aims to achieve.

Foreword

Although the ACA does not require codes to contain a foreword, some industry bodies may choose to include one. However, consideration should be given to any duplication of purpose between a foreword and the explanatory statement, scope and objectives sections of the code.

Definitions

Codes should contain a list of definitions of the terms used in the code. Information on the use of definitions is included in the drafting principles at Appendix D.

Code rules

The code must contain a comprehensive set of rules which are directed at achieving, demonstrating and measuring the achievement of the code objectives. The code should be based on the best objective data available on the matter being addressed. This should include, where applicable, nationally and internationally accepted benchmarks in the relevant field.

Code rules must also address the concerns of the groups and individuals consulted during the development of the code. This will include views expressed by participants in the relevant section or sections of the industry and the public, as well as the views of the Australian Competition and Consumer Commission (ACCC), the Telecommunications Industry Ombudsman (TIO), consumer representatives and, in the case of telecommunications privacy codes and codes dealing with matters related to the National Privacy Principles or a code approved under the Privacy Act, the Privacy Commissioner.

The certificate of mandatory consultation on industry code under Part 6 of the *Telecommunications Act 1997* at Appendix C contains a list of matters about which industry bodies should seek specific comment from the ACCC, the TIO and the Privacy Commissioner.

Codes should include rules that provide a public demonstration that code objectives are being pursued by industry participants. Such rules could be specific to each code and should not place an undue burden on carriage service providers (CSPs). For this reason, such rules may be restricted in their application to CSPs that meet thresholds relevant to the code that are specified in the code, such as a minimum customer base or provision of particular types of services. If these provisions are considered by the ACA to be too onerous on small or new players, the code may fail to meet the appropriateness test under section 117(1)(d) of the Act.

Enforceability

Code rules should be written concisely and in plain English. They must be expressed in mandatory terms such as ‘must’ instead of ‘should’ or ‘may’. This is required in order for the industry body and the ACA to be able to enforce the code. As the ACA can only make a direction

to comply with a code under section 121 if it is satisfied that the participant in the section of the telecommunications industry has contravened the code, it is important that rules of a code which are intended to be mandatory are expressed in terms which create a clear obligation on the participants to comply with the requirements.

Industry bodies should give careful consideration to the level of specification in code rules. For example:

- ‘A notice should be provided to the customer’ is not an enforceable rule.
- ‘A written notice must be provided giving reasonable advance notice of the intention to ...’ is enforceable.

Industry bodies are encouraged not to over-specify rules in codes which primarily address consumer protection issues, while still ensuring that code rules are enforceable. Specification of business practices in consumer codes should be avoided except for rules that are intended as safety net provisions.

In addition to being expressed in mandatory terms, codes must also relate to telecommunications activities. Code rules must also be internally consistent.

Guidelines

As well as providing mandatory code rules, industry bodies may also choose to include non-mandatory provisions in codes. Indicative guidelines or examples of how code rules can be adequately implemented may also be developed. Guidelines may be contained in a separate document appended to the code. They may be developed by the industry body which drafts the code, or by the individual companies which are covered by the code.

Consumer protections

To meet the requirement to provide ‘appropriate community safeguards’ codes which primarily address consumer protection issues must contain obligations which will protect consumers. They must contain clear statements of the code’s objectives, unambiguous rules and rules that will demonstrate that code objectives are being met.

The code rules must be enforceable, while providing the scope for individual businesses to implement their own approaches to the code, rather than stipulating specific business practices. For codes that are about the relationship between suppliers and customers, the rules should also demonstrate the effectiveness of the code. These could require, for example, regular public reporting, or the ready availability of company policies, customer charters or methods by which consumers may contact suppliers, where relevant.

Delayed implementation of code provisions

Codes with provisions which commence at a date in the future can be registered by the ACA under certain circumstances. In registering a code, the ACA must ensure under the public interest balance test that public

interest considerations are addressed without imposing undue financial and administrative burdens on industry.

When considering a code with delayed implementation, the ACA must be satisfied that, in delaying the commencement of the provisions, the public interest in commencing the provisions immediately is outweighed by the burdens the code will impose on industry and that these burdens are undue. The burdens that industry would suffer in commencing the provisions immediately and how they are undue or unfair should be clearly elaborated in the Explanatory Statement to the code.

Contractual arrangements

In some cases the performance of code obligations may entail persons who are subject to a code entering into contractual relationships. There are two main kinds of contractual relationships that would fit this description; contractual arrangements between participants in a section of the industry who are subject to the code and those between a participant in a section of the industry who is subject to the code and another person, for example, an agency relationship.

Bilateral agreements

A bilateral agreement is a general term for an agreement between parties. However, for the purpose of this guide, a ‘bilateral agreement’ means a contract between two parties who are participants in a section of the industry described in subsection 110(2) where both parties are subject to the same industry code. These agreements may deal with mechanical or administrative processes that address compliance with code obligations, or they may involve commercial arrangements between the parties that are not directly related to code compliance.

Care has to be taken in drafting references to bilateral agreements in codes, because there are some matters which, if not avoided, will have the effect that the ACA will be unable to register the code. In particular, any provisions which would have the effect of asking the ACA, by way of enforcement, to act as if it were a court will be unacceptable.

The following principles must be followed when considering referring to a bilateral agreement in a code:

- Codes must not be dependent on bilateral agreements. Codes must be able to have meaningful content without reference to the agreements that may or may not stand behind them.
- Codes must not refer to bilateral agreements in such a way that the ACA could become involved in trying to enforce terms of a contract on one party in favour of another party.
- Codes must not refer to bilateral agreements in such a way that the failure to agree on a bilateral issue could constitute a breach of the code. A complaint that another party is refusing to enter into a reasonable bilateral arrangement cannot be dealt with as a breach of a code.

- It may be acceptable for a code to refer to the matters that should be in bilateral agreements, where they exist, as long as they do not specify the content of the contract clauses. Therefore, for example, it may be acceptable for a code to have a provision that bilateral agreements may contain a clause dealing with the indemnities for any risks arising from the provisions of the code, but not to specify what those indemnities are. However, it should be noted that a breach of a bilateral agreement may not be a breach of a code.
- Bilateral agreements must be consistent with code provisions and any requirements imposed by state or Commonwealth legislation, for example, the *Trade Practices Act 1974* and the *Disability Discrimination Act 1992*. Bilateral agreements must not allow for standards lower than those prescribed in the code.

Some examples of acceptable bilateral clauses are at Appendix F.

Agency agreements

An agency agreement is a contract that requires one party to act on behalf of the other party, that is, as an agent for a principal. Through the laws of agency, principals are responsible for ensuring that agents comply with codes when acting on the principal's behalf. A principal who is a participant in a section of the telecommunications industry covered by a code may authorise their agent to undertake telecommunications activities that are covered by codes.

An important principle of the operation of codes and agency agreements is that codes must not operate in a way which attempts to remove the legal responsibility of a principal for the behaviour of its agent. A code may not direct principals to include particular matters in their contracts with agents. However, codes may acknowledge the laws of agency by:

- requiring principals to ensure that agents who have been authorised to act on the principal's behalf are aware of any rules set out in the code which are relevant to their conduct as an agent;
- requiring that principals include clauses in their contracts with agents stipulating that the agents must comply with relevant industry codes; or
- requiring principals to put in place mechanisms for monitoring agents in order to ensure that agents do not place principals in breach of a code rule.

Pecuniary penalties

Codes must not prescribe pecuniary penalties for breaches of code rules. The reason for this is that imposing a pecuniary penalty is an exercise of judicial power. Only courts can exercise judicial power. Therefore, the ACA would be unable to direct an organisation that is in breach of a code to pay a pecuniary penalty.

Indemnity clauses

Codes must not include clauses that indemnify one party against loss suffered as a result of a breach of a code. Indemnity clauses can only be enforced by courts and cannot be enforced by the ACA.

Compliance with code rules

Code rules should also set out implementation mechanisms which assist signatories to establish compliance with the code rules. In some cases compliance mechanisms may be mandatory requirements of code rules and in other cases they may provide guidance on the kinds of measures which may be taken into account in the development of compliance programs. Compliance mechanisms enable code signatories to readily establish their obligations in relation to complying with a particular code. They also assist in assessing whether code objectives have been met and facilitate compliance monitoring by industry bodies.

For further information on developing compliance mechanisms, see the Australian Standard *AS 3806-1998 Compliance programs*.

Referencing other documents

As far as possible codes should be stand-alone documents. This means that they should be self-contained and generally not refer to other documents, including other codes.

Nevertheless, it will sometimes be necessary to reference other documents in codes, either to establish consistent compliance requirements or to provide guidance on appropriate performance standards in meeting the code's provisions. Industry bodies should take into account that any referenced documents, whether referenced for compliance or guidance reasons, may change from time to time. This may mean that the version of the document referenced or incorporated in the code is not the most recent version. It may also result in the code's provisions becoming redundant or inconsistent.

Whenever documents referenced in codes are amended, industry bodies must give consideration to resubmitting the code to the ACA for registration with revised references. Copies of all referenced documents must be clearly referenced or included in a code registration application.

Referencing documents in codes must conform to the following requirements.

Requiring compliance with referenced documents

Where the code rules refer to rules or standards contained in another document the code must either refer to a particular version of the document, or alternatively the whole document must be incorporated as a schedule to the code. When the code requires compliance with the other document, it must not refer to the other document 'as amended from time to time', or without stating a version or date of the document.

For example, if a code was to require compliance with a particular technical standard as one of the code's provisions, the reference to the technical standard must include the date or version of the technical standard.

The reason for this is to satisfy the provisions of section 120 of the Act, relating to the replacement of registered codes. Section 120 requires that registered codes must not be amended, they may only be replaced in their entirety. When codes reference other documents, those documents become a part of the code. As a result any amendments made to the referenced document become an amendment to the code. This could even occur without the knowledge of the industry body or the ACA. Without re-registration of the amended code, this would amount to a breach of section 120. To avoid breaching section 120, any referenced document must either be referenced by a particular version, or the referenced document must be included as a schedule to the code as a whole.

In addition, where codes create obligations through referenced documents, the definitions in the code must be consistent with the definitions in the referenced document. If they are not, the code is likely to be internally inconsistent, rendering its provisions unenforceable.

Providing guidance with referenced documents

Sometimes a code may need to refer to another document to provide guidance as to appropriate performance standards or procedures in complying with a code. For example, a code may refer to a particular guideline or voluntary standard in order to indicate to code signatories the performance standards or procedures which would be considered appropriate in meeting certain code provisions. In this case, documents may be referenced 'as amended from time to time'.

When drafting the code rule, care must be taken that it does not place an obligation on signatories to comply with the referenced document. Industry bodies must use terminology such as 'should have regard to'.

Consistency with legislation and telecommunications instruments

Codes must be consistent with the provisions of the Act and with other legislation, such as the *Trade Practices Act 1974* and the *Disability Discrimination Act 1992*. They must also be consistent with relevant instruments, such as the *Telecommunications Numbering Plan 1997* and the *Telecommunications (Customer Service Guarantee) Standard 2000*. This is because codes are inferior to both Acts of Parliament and to instruments which are delegated legislation. Where a code is inconsistent with any Act of Parliament or any delegated legislation, the particular Act or instrument takes precedence. Any inconsistency would result in the ACA being unable to register the code.

However, while codes are required to be both based upon and consistent with the Act or instrument, they should not repeat or paraphrase it. One of the main

roles of codes is to provide industry-initiated solutions to issues that are not covered by legislation.

Codes presented to the ACA for registration must also be consistent with codes already registered with the ACA.

Design features and performance requirements (section 115)

Section 115 of the Act restricts the ability of codes to impose design features or performance requirements on telecommunications facilities and networks, and on customer equipment and cabling. Careful attention should be paid to this section, or code provisions may be ineffective.

Content matters (section 116)

Industry codes cannot deal with matters covered by codes registered under the *Broadcasting Services Act 1992*. Where industry bodies wish to register codes with both the Australian Broadcasting Authority and the ACA, the matters relevant to the jurisdiction of each agency must be developed in separate codes.

Anti-competitive implications

There may be cases where engaging in conduct under a code places code signatories at risk of breaching one or more provisions of the *Trade Practices Act 1974*. For some forms of conduct an authorisation, which exempts a party from suit under the *Trade Practices Act 1974*, may be granted by the ACCC if there are public benefits flowing from the conduct which outweigh the anti-competitive detriments inherent in the conduct. Industry bodies should initiate discussions early in the code development process with the ACCC on the potential for code provisions to be anti-competitive and the necessity for an authorisation application.

An application for authorisation in relation to a code which is outstanding with the ACCC does not prevent the ACA from registering the code if it is presented to it and meets the requirements of section 117 of the Act. Industry bodies may conduct the two processes in parallel.

For further information on authorisation see the ACCC publication *Authorisations and notifications* (available at www.accc.gov.au/fs-pubs.htm) or contact the ACCC for advice.

CODE ADMINISTRATION AND COMPLIANCE

Under paragraph 117(1)(d) of the Act, the ACA must be satisfied that industry codes presented for registration contain appropriate community safeguards (in the case of codes dealing with matters of substantial relevance to the community) or deal with the matters covered in an appropriate manner (for other codes). Industry-initiated code administration processes play a key role in ensuring that codes are 'appropriate' in terms of the paragraph 117(1)(d) tests. It is important that codes are supported by structures which enable the code rules to be effectively administered by the industry body.

The ACA's powers in relation to directing compliance with industry codes are intended to provide a safety net to support these industry initiated code compliance mechanisms. Industry code compliance mechanisms should not seek to operate by conferring functions or powers on the ACA. They must not operate to direct or circumscribe the ACA's exercise of its powers under sections 121 and 122.

In order to be effective, industry code administration regimes should provide for the following functions.

Code administration body

Satisfactory code administration requires that the industry body responsible for registering the code with the ACA also takes responsibility for the ongoing code administration. Usually this will be through the establishment of a dedicated administration body, such as a committee. The body is responsible for investigating and monitoring complaints by industry participants, including a coalition of consumer representatives, about code signatories. The code should outline the administration body's terms of reference, the mode of appointment to the body and the minimum number of times it should meet each year.

Code review

The ACA has an important role under section 125 in ensuring that registered codes continue to meet registration criteria. Codes should provide for regular review and amendment of the provisions of the code to ensure they are meeting community expectations and working effectively.

Industry bodies should promote discussion on codes and make recommendations for improvement. Among the matters considered should be whether the revised code should apply to any new sections of the industry that have been created, any matters asked to be attended to by a provider of a mandatory consultation certificate and any recommendations made by the ACA when the code was registered. Suggested amendments should be considered promptly and resolution of the consideration referred to the submitter.

Under section 120 of the Act, changes to registered codes must be effected by the registration of a new code and not by amending the old code. New codes which differ in only minor respects from old codes are not subject to the industry and public comment provisions of paragraphs 117(1)(e) and (f).

Representation on the code administration body

Administration bodies should aim to balance the representation of affected parties including consumer representatives and have an independent chair. It may also be appropriate to include representatives with appropriate expertise, such as technical expertise. Representation of disinterested and non-industry parties will help to ensure that codes do not only operate in the interests of the industry, or a section of the industry, but rather reflect the broader objects of the Act and related legislation.

Complaints handling and independent review of decisions

The code should include provision for complaints-handling processes to be the responsibility of the signatories to the code. Where a complainant is dissatisfied with the outcome or management of the complaint by a code signatory, recourse should be available to an independent arbitrator, such as the TIO for consumer complaints. Dispute-resolution charging structures should not act as a disincentive to progressing a complaint, particularly in the case of consumer complaints.

Conferring powers and functions on the TIO (section 114) and other complaint-handling bodies

Section 114 enables the TIO to consent to functions and powers under codes. The TIO may accept complaints from consumers and industry bodies may also establish complaint bodies to manage complaints from industry. Where complaint-handling bodies or the TIO have agreed to undertake complaint functions under a code, the code must state this. It must also indicate what functions and powers will be undertaken by the complaint-handling body and which code provisions they relate to. Functions may include receiving, investigating, facilitating the resolution of, making determinations relating to, and giving directions relating to complaints arising from matters dealt with by the code.

For general information on complaints-handling and dispute resolution, see the *Australian Standard AS 4269-1995 Complaints handling*, the ACCC guide *Benchmarks for dispute avoidance and resolution – a guide* (October 1997), which is on the ACCC website at www.accc.gov.au/docs/bench/httoc.html, and the guide *Benchmarks for industry-based customer dispute resolution schemes* (October 1997), which is at www.selfregulation.gov.au/publications/BenchmarksForIndustry-BasedCustomerDisputeResolutionSchemes/index.asp.

Sanctions

Codes work best to protect consumers and industry when appropriate sanctions can be imposed where necessary. Sanctions should be developed on a sliding scale and should be commercially significant. However, codes must not prescribe pecuniary penalties for breaches of code rules.

For general information on sanctions, see the Ministerial Council on Consumer Affairs guide *Fair trading codes of conduct: Why have them. How to prepare them. A guide prepared by Commonwealth, State and Territory Consumer Affairs Agencies* (June 1998).

Complaints data

The code administration body should collect detailed data on the numbers, types, sources and resolution of complaints.

Compliance monitoring mechanisms

The code administration body should also monitor compliance to ensure adherence to the code's objectives and that code signatories complying with the code are not being disadvantaged.

Provisions for public awareness

Public awareness is critical to achieving the self-regulatory objectives of codes concerning consumer matters or matters of general public interest. Consumer codes in particular should include provisions to publicise the code to consumers, including its objectives, its complaints-handling processes and other functions. The strategies for promoting public awareness would be expected to vary between codes.

Provisions for industry training

Codes should also provide for awareness to be promoted among employees and agents of code signatories, who should be instructed in the principles and procedures of the code. Where appropriate, codes should contain implementation guidelines to assist code participants in the practical application of the code rules.

Accountability

The ACA has continuing responsibilities under section 105 of the Act to monitor the adequacy of carrier and CSP compliance with registered codes. Codes should operate transparently and regular reporting on the effectiveness of a code assists in this process.

Administration bodies should produce publicly available annual reports on the operation of the code including:

- levels of compliance;
- the numbers, types, sources and resolution of complaints;
- identification of systemic issues; and
- outcomes of code reviews.

The ACA approaches code administration bodies for advice on these matters in compiling its annual report to the Minister on telecommunications industry performance under section 105 of the Act.

For general information on the drafting of industry codes see the Ministerial Council on Consumer Affairs guide *Fair trading codes of conduct: Why have them. How to prepare them. A guide prepared by Commonwealth, State and Territory Consumer Affairs Agencies* (June 1998).

ESTABLISHING THE NEED FOR A CODE

For a code to be registered with the ACA, it must not only meet the requirements of the Act and delegated legislation, but should also be drafted in accordance with regulatory principles. As a result, both the content and form of the code require careful planning before the development of a code is commenced.

Policy principles that underpin code registration – the public interest balance test

The ACA's decision-making powers under section 117 of the Act are subject to the provisions of section 112. This means that in exercising its powers to register a code, the Act obliges the ACA to act in a manner which enables public interest considerations to be addressed without imposing undue financial and administrative burdens on participants in the telecommunications industry. This obligation is referred to in this guide as the 'public interest balance test'. Under this test, the ACA must have regard to, but is not limited to, considering:

- the number of customers likely to benefit from the code;
- the extent to which they are residential and small business customers;
- the legitimate business interests of the industry; and
- the public interest, including the efficient, equitable and ecologically sustainable supply of telecommunications goods and services.

Consideration of all regulatory options

An important regulatory policy principle is that regulation must be both effective and efficient in achieving its objectives. In part, this requires the choice of the best regulatory option. Before developing a code, industry bodies should consider all available regulatory options, such as guidelines, specifications or voluntary codes.

In short, before an industry body develops a code, it should be satisfied that a code registered with the ACA is the best regulatory solution. Consideration of available regulatory options may result in choosing solutions that do not require a registered code. For example, it may be concluded in some cases that the development of industry guidelines is more appropriate.

Preparing to draft a code

Satisfying the regulatory requirements for registration of the code with the ACA means that, in practice, industry bodies will need to plan their approach to code drafting. It is suggested that industry bodies clarify the following issues before commencing work on drafting the code:

- the nature of the problem or issue—identifying all sources of evidence which assist in assessing the extent and characteristics of the problem;
- the existing regulatory framework—identify any gaps in regulation which a code needs to address;
- all the possible regulatory options with an understanding about why a registered code is the preferred option;
- the aims and objectives of the code—describe what the code will achieve and its expected outcomes; and
- who will be affected by the code.

The Explanatory Statement

Industry bodies can assist the ACA in its decisions regarding the application of the public interest balance test by providing Explanatory Statements to codes. A suggested template for an Explanatory Statement is included at Appendix G.

The Explanatory Statement can play three important roles. The first is to provide an explanation by the industry body to consumers and the industry about the purpose of the code and the policy intention underlying it. The second purpose of the Explanatory Statement is to assist the ACA in making judgements as to whether registering the code would meet the ACA's decision-making obligations under the public interest balance test. The third is to assist the ACA in its consultation with the Office of Regulation Review (ORR). The role and requirements of the ORR are outlined below.

The ACA considers Explanatory Statements to be a valuable inclusion in codes. While the ACA is obliged under the Act to make independent assessments in relation to the public interest balance test, Explanatory Statements ensure that industry provides important information to the ACA for use in making its judgements under section 112. Explanatory Statements give industry bodies the opportunity to represent an industry perspective on the need for the code and the balance achieved in the code between public interest matters and the imposition of administrative and financial burdens.

Where an Explanatory Statement is not provided, the ACA may be obliged to contact the industry body for further information on the anticipated benefits and costs of the code, which may delay the process of registration. By providing Explanatory Statements that address all relevant matters requested in this guide, industry bodies may assist the ACA in delivering timely decisions on code registration applications.

The Office of Regulation Review

As well as applying the criteria of sections 112 and 117, the ACA must also consult with ORR as part of the code registration process. Part of this consultation includes the preparation of a Regulation Impact Statement (RIS), which sets out the impact of the proposed code on industry and consumers. Some of the information required by the ACA to satisfy ORR's criteria can be provided by industry bodies in code Explanatory Statements. For information on the role of the ORR and its requirements, please see the ORR's guide, *A Guide to Regulation – Second Edition: December 1998* (available at www.pc.gov.au/orr/reguide2/reguide2.pdf).

The content of the Explanatory Statement

Following planning for code drafting, industry bodies should be well prepared for commencing drafting of an Explanatory Statement to the code. If the Explanatory Statement is to assist the registration process, there are a number of things it should achieve:

- An Explanatory Statement should serve to provide a greater level of background information to the code than is provided by the code objectives.
- The Explanatory Statement should outline the problem or issue at hand and the industry and consumer matters the code is designed to address.
- The Explanatory Statement should state why the code is required and the policy outcomes it is expected to achieve.
- It should outline why a code is the preferred regulatory option and why current regulatory arrangements are unsatisfactory. It should give case examples where appropriate.
- The Explanatory Statement should explain how the code will achieve the policy objectives, for example, by requiring particular standards to be met.
- The anticipated benefits to telecommunications consumers should be clearly elaborated, including the numbers of consumers likely to benefit and whether they are small business or residential consumers.
- The Explanatory Statement should outline the benefits to industry that are anticipated from the implementation of the code. It should also provide estimates of the costs to telecommunications businesses of complying with the code provisions.
- Where a code contains delayed implementation clauses, the Explanatory Statement must carefully explain the need for the delay and the implications of immediate commencement.

- Where a code is already in place for a particular matter, the Explanatory Statement for a revised code should make clear the new elements of the code and explain how the revised code improves upon the existing regulatory arrangements (which will include the already registered code).
- Finally, the Explanatory Statement should address whether there are any other public interest issues raised or addressed by the code.

DEVELOPING A CODE FOR REGISTRATION

When a code is presented to the ACA for registration, either voluntarily by an industry body or in response to a request by the ACA under section 118 of the Act, the ACA is required to evaluate whether it is satisfied that the code will be registered on the Section 136 Register.

Under section 117, the ACA must be satisfied that an exhaustive list of 11 (or 13 in the case of telecommunications privacy codes) separate criteria have been met. Each code presented to the ACA must be assessed on its merits against these criteria in the context of the public interest balance test at section 112. The ACA has no discretion to exempt a code registration application from any of the requirements of section 117, except where a code is replacing a code already registered and the new code differs in only minor respects from the code it is replacing.

The role of industry bodies

Part 6 of the Act places considerable emphasis on the achievement of industry self-regulatory activities through industry bodies. Industry bodies will initiate and develop codes in consultation with industry, consumers and government and administer the provisions of registered codes.

The Act requires that industry bodies represent the sections of the telecommunications industry that will be covered by the code they have developed. Sections of the industry are defined under subsection 110(2) as:

- (a) carriers;
- (b) service providers;
- (c) carriage service providers;
- (d) carriage service providers who supply standard telephone services;
- (e) carriage service providers who supply public mobile telecommunications services;
- (f) content service providers;
- (g) persons who perform cabling work (within the meaning of Division 9 of Part 21);
- (h) persons who manufacture or import customer equipment or customer cabling.

In addition to these definitions, subsection 110(3) gives the ACA the power to determine a section of the industry. Using this power, the ACA has declared the following groups to be sections of the industry:

- public number directory producers;
- portability service suppliers;
- the National Relay Service provider; and
- cabling service operators.

Industry bodies do not have to be incorporated associations, but should endeavour to ensure that, in their membership composition, they are as representative as possible of the sections of the industry which are covered by their codes. This will have the dual benefit of fostering the widest possible voluntary industry subscription to their codes, as well as supporting applications for code registration with the ACA.

Code content

Industry bodies are encouraged to be pro-active in identifying industry issues requiring self-regulation by codes and developing codes to address them.

The code must deal with one or more matters relating to the telecommunications activities of the participants in the section of the industry to which the code relates. Section 109 defines 'telecommunications activity' as:

- (a) carrying on business as a carrier; or
- (b) carrying on business as a carriage service provider; or
- (c) supplying goods or services for use in connection with the supply of a listed carriage service; or
- (d) supplying a content service using a listed carriage service; or
- (e) manufacturing or importing customer equipment or customer cabling; or
- (f) installing, maintaining, operating or providing access to:
 - (i) a telecommunications network; or
 - (ii) a facility;

used to supply a listed carriage service.

In addition, section 113 of the Act provides examples of matters which could be dealt with by codes.

Codes must also be consistent with the objects of the Act. Among other things, codes must promote:

- the long-term interests of end-users of telecommunications services;
- the efficiency and international competitiveness of the Australian telecommunications industry;
- service innovation, and the efficient, equitable and responsive delivery of telecommunications goods and services;
- market participation by all sectors of the Australian telecommunications industry;
- an efficient, competitive and responsive telecommunications industry; and
- appropriate safeguards for telecommunications consumers, particularly insofar as they are residential or small business customers.

Before commencing development of a new code, industry bodies should also check for registered codes that deal with similar issues in the same sections of the industry to the matters proposed for coverage by the new code. The register is maintained by the ACA, as required by section 136 of the Act, on its website at www.aca.gov.au/telcomm/industry_codes/register_of_codes/codint.htm.

Consultation

Industry bodies should undertake consultation during the development of the code. Part 6 places great importance on broad and thorough consultation with all interested parties. This can occur through the participation of representatives of end-users in the code development process and consultation with end-users. The involvement of end-user representatives in the code development process is desirable as it is likely to lead to codes which deal usefully and practically with important issues.

Consultation must be full and proper and industry bodies must give consideration to the comments raised during consultation. Comments should be considered promptly and resolution referred back to the submitter. The following sections provide guidance to industry bodies in relation to how consultation must be conducted and considered when finalising a code for registration. The ACA, when making decisions relating to the appropriateness of codes under paragraph 117(1)(d), may take into account the extent to which concerns raised in the comments provided to industry bodies are addressed in a code.

Mandatory agency consultation

Industry bodies must undertake consultation on codes with the ACCC, the TIO, at least one consumer representative organisation and, in the case of telecommunications privacy codes under paragraph 113(3)(f) (matters related to the National Privacy Principles or a code approved under the Privacy Act), the Privacy Commissioner. Consultation must provide an adequate and real opportunity for agencies to make comments, including sufficient time in which to make comments. Industry bodies must take into account, and be able to demonstrate they have taken account of, the views expressed.

Informal consultation

Informal consultation with these agencies should commence early in the code's development.

Section 114 enables codes to confer powers and functions on the TIO. Industry bodies are encouraged to commence discussions with the TIO on code consumer complaints processes early in the development phase and where required obtain written consent from the TIO to its involvement in handling complaints which allege breaches of the code.

Industry bodies should also initiate early discussions with the ACCC, particularly on the potential for code

provisions to be anti-competitive and the necessity for an authorisation application.

Consultation with the Privacy Commissioner should also commence early in the code's development. Apart from the obligation of industry bodies to consult the Privacy Commissioner on telecommunications privacy codes under paragraph 113(3)(f), the ACA is also obliged to consult the Privacy Commissioner on codes submitted for registration that deal with matters related to the National Privacy Principles or a code approved under the Privacy Act. Industry bodies should note that, as a general guide, any code dealing with the personal information of customers, whether or not it is predominantly a telecommunications privacy code, will require consultation with the Privacy Commissioner.

Formal consultation

Industry bodies must not rely on informal consultation, such as the participation of the agencies in code drafting committees, to satisfy the consultation requirements of a code registration application. Prior to submission of the code for registration, a formal application must be made to each of the agencies for comment on the code. Industry bodies should take care to liaise with agencies on agreeing timeframes for the provision of comment in the formal consultation phase. Formal comments provided by the agency as part of the registration application must be made on a final draft of the code.

Industry and public consultation

Industry bodies are also required to undertake broad public consultation with affected industry participants and the general public before submitting a code for registration. The industry body must invite participants in the affected section or sections of the industry and the public to make submissions on the draft code within the 30-day minimum period provided by the Act.

Methods of extending invitations for submission

The announcement of invitations to comment on a code must be made in ways that are not likely to restrict opportunities for industry and the public to comment on the draft code. Invitations to comment must be extended in a manner which is appropriate to the target audience. For example, an announcement in a trade journal or website of an invitation to submit comments could be appropriate notice for participants in the industry, but not for the general public, which would be better targeted through a medium such as major daily newspapers.

Industry bodies should also consider utilising existing consumer, government and industry networks for disseminating information and stimulating discussion and comment on draft codes. These groups should include representatives of people with disabilities, rural and remote consumers, the elderly and local, state or federal government agencies in addition to other industry bodies.

Consultation within the industry must be undertaken with participants in the section of the industry to which the code relates. In some cases, codes will cover more than one section of the industry. Industry bodies must take care to clearly direct invitations to submit comments to all sections of the industry which are covered by the provisions of the code. In some cases, a section of the industry will be small enough to allow a targeted direct mail campaign or for all participants of the section of industry to be members of the industry body.

Industry bodies must also aim to ensure that draft codes are published in ways that do not adversely restrict the likelihood of receiving submissions, particularly from members of the public. Draft codes must be available in the most accessible manner possible, preferably at either cost recovery rate or free of charge. Copies of draft codes could also be held for inspection at the premises of the industry body and its members or at libraries. Internet access should also be considered as a supplementary means of distribution.

Calculating the consultation period

The method by which the 30-day minimum consultation period is calculated derives from the *Acts Interpretation Act 1901*. This Act provides that the consultation period begins on the day immediately following the day that the invitation to comment is announced. For example, where an invitation for comment first appears on the 14th of the month, the consultation period begins at midnight, which is effectively the 15th. In addition, the last day of a period is not counted if it is a Saturday, Sunday, public holiday or bank holiday in the place where the period is calculated. If the last day would have been a Saturday, Sunday, public holiday or bank holiday, the last day of the period becomes the next day that is not a Saturday, Sunday, public holiday or bank holiday.

For invitations to comment sent by post, the minimum specified period of 30 days begins three days after the invitation was posted. The 30-day period expires at midnight on the 30th day.

Meaningful and adequate consultation

Industry bodies should note that the 30-day consultation period for codes is only a minimum period and serious consideration to a longer consultation period should be given where appropriate. In assessing a code for registration, the ACA will not only examine whether the minimum consultation period has been satisfied for the purposes of the Act, but also whether the consultation period has been adequate in all the circumstances.

In particular, the ACA will focus on whether the affected parties had a reasonable chance to comment on the draft code. Therefore, a 30-day period that begins on a public holiday or a weekend, or that occurs over Christmas or Easter, will not be considered adequate.

Furthermore, a 30-day consultation period where there are other related codes in the public domain that also require comment may not be considered adequate. Another relevant consideration in deciding on the adequacy of a consultation period is the length and complexity of the code. Where there is any concern or doubt about the consultation period, guidance should be sought from the ACA.

Changes to the code after consultation has occurred

In cases where substantive changes are made to a code that has already undergone the required public and industry consultation period, a second round of comment may be required to ensure that full and proper consultation is achieved. A second round of public and industry comment would be required, for example, where comment resulted in the application of the code to a new section of the industry or where comment resulted in a substantial increase in the nature or scope of the code rules.

Consultation and section 120

Under section 120, changes to registered industry codes must be achieved by replacing the code in its entirety. However, if the new code differs in only minor respects from the original, the industry body developing the code may not be required to undertake industry and public consultation under paragraphs 117(1)(e) and (f) of the Act.

What constitutes a minor change to a code will differ in individual circumstances. Nevertheless, as a general rule minor changes are changes that do not alter the meaning or substance of any of the provisions of the code. Minor changes are likely to be changes that industry or the public would be unlikely to want to comment on. One example is the correction of typographical errors. Where there is any doubt about whether affected parties may wish to comment, the code should be resubmitted for consultation.

APPLYING FOR REGISTRATION OF A CODE WITH THE ACA

Following the development of a code and the completion of consultation, industry bodies may choose to apply to the ACA for registration of the code on the Section 136 Register. This section provides guidance on how industry bodies should lodge registration applications with the ACA and the kinds of evidence that should be provided with applications so that the ACA may be satisfied that the requirements of section 117 have been met. By following the ACA's administrative requirements as contained in this guide, industry bodies can assist the ACA in timely decisions on code registration applications.

Presenting the code to the ACA for registration

Registration of an industry code must be initiated by the industry body that has developed the code. To meet the requirements of paragraph 117(1)(c), code registration applications must be signed by a person who is authorised by the industry body to do so. Where a code has been initiated by more than one industry body through an affiliation arrangement, the registration application must be signed by an authorised person from each of the industry bodies involved.

Industry bodies may commence formal registration proceedings by submitting the code, including the Explanatory Statement and supporting documentation, to the ACA using the form Application for registration of telecommunications industry code, which is at Appendix B to this guide. The code should be submitted to the ACA at the address shown on the form. The code should be forwarded by post or courier, or hand delivered to the ACA. Because of the poor quality of some facsimile transmissions, the ACA will not accept applications for code registration by facsimile machine.

Industry bodies should submit the code both in print form and electronically by email or on computer disc. Electronic copies of codes should be provided in Microsoft Word, rich text format (RTF) or portable document format (PDF).

Providing documentation

The industry body must provide documentation to support claims to all criteria in subsection 117(1) of the Act with the registration application. A checklist of the required supporting documentation is at the end of this guide. Where the application form for registration of a telecommunications industry code requests supporting documentation, this documentation must be provided for the ACA to be satisfied that the requirements of subsection 117(1) have been met. Applications that are lodged without the required documentation will delay the ACA's consideration of the code. If this documentation cannot be provided, the ACA is unable to meet the requirements of the Act and, as a result, unable to register the code.

Representing a section of the industry

Applications for registration must clearly indicate the following:

- The section or sections of the industry the body claims to represent and to which the code applies. 'Sections of the telecommunications industry' are listed in subsection 110(2). Under subsection 110(3) the ACA may also determine sections of the industry. The sections of the industry represented by the industry body and covered by the code must accord with either those listed at section 110, or those determined by the ACA under subsection 110(3). Note that including this information in the registration application does not obviate the need for the code itself to clearly state the section or sections of the industry covered by the code.
- Supporting evidence of the industry body's claim to represent the section or sections of the industry.

Suitable evidence to support claims to represent sections of the industry could include one, or a combination, of the following:

- membership data verifying membership of all or a majority of the participants in a section of the industry;
- verification of affiliations between the body and other industry bodies which also subscribe to the code, with the combined membership forming a majority of the participants in the section;
- membership data verifying membership of key industry players, which collectively provide a representative cross sample of the section or sections of the industry, in relevant areas such as market share and products and services; or
- any other information that will assist the ACA in deciding whether the industry body represents the particular section or sections of the industry.

Industry bodies should also provide details of participants in the section of the industry who are not members of the body.

Substantiating invitations for industry and public submissions

Before submitting the code, the industry body must have concluded all consultation required by subsection 117(1). All documentation confirming that consultation has been completed should be prepared ready for submission with the code registration application to the ACA.

The ACA must be satisfied that a draft code was published and that industry and the public were invited to submit comments. Applications for code registration should include documentary evidence of:

- invitations to participants in each of the relevant section or sections of the industry to make submissions on the draft code; or
- the participation of all members of a section of the industry in the industry body; and
- a copy of the invitation for the submission of comment on the draft code extended to the public;
- a list of the methods of extending invitations to the industry and the public, such as advertisements posted in newspapers, industry periodicals and the mass media;
- the dates on which invitation to comment was published;
- publication of the draft code, including the ways in which the code was made available and any fees charged; and
- the period of time, including dates, during which the body received submissions.

Substantiating the consideration given to submissions from industry and the public

Before it can register a code, the ACA must be satisfied that consideration was given by the industry body to the comments it received on the draft code during the consultation phase. This requires industry bodies to provide evidence that proper account was taken of the comments provided in submissions during the development of the code. Bodies should provide:

- a list of submitters;
- summaries of the comments provided;
- summaries of how the comments were incorporated into the code; and
- if the comments were rejected, summaries of the reasons why the submissions were rejected.

Substantiating consultation with mandatory consultation agencies

Confirmation of consultation should be obtained from each of the ACCC, the TIO, a consumer representative or representatives and, where required, the Privacy Commissioner on the form Certificate of mandatory consultation on industry code under Part 6 of the *Telecommunications Act 1997*. This form has been developed by the ACA in consultation with the mandatory consultation agencies. One form should be completed and signed by an authorised officer from each of the agencies concerned.

Consultation with these agencies on codes must be full and proper consultation. Industry bodies should demonstrate in their registration applications that they took account of the comments provided by the agencies when developing the code. This can be demonstrated either by amendment to the code in line with the comments, or by providing to the ACA a summary of the reasons why comments were rejected for inclusion in the code.

The registration process

Timeframes

The ACA will endeavour to assess codes for registration in a timely fashion. However, timeframes for code assessment may vary widely, depending on the complexity of the code. Assessment of a less complex code for which all documentation is provided should take approximately two months. Industry bodies may assist the ACA in delivering timely decisions on code registration applications by ensuring all documentation is provided to the ACA in accordance with the requirements of this guide.

Confirmation of receipt

The ACA will acknowledge in writing the receipt of each industry code presented to it for registration. Acknowledgments will provide an ACA contact officer for enquiries regarding the progress of the code registration application. Industry bodies will also be notified where applications do not meet the ACA's documentation or other requirements.

Outcome of ACA consideration

Following consideration of a registration application, the ACA will make a determination as to whether it is satisfied the code meets the requirements of section 117 and whether or not the code will be registered. Codes that satisfy the requirements of section 117 must be included by the ACA on the Section 136 Register. Industry bodies will be notified in writing of the outcome of a registration application within two working days of an ACA decision.

The Section 136 Register

The Section 136 Register on the ACA website contains all industry codes registered with the ACA under Part 6 as well as other information as stipulated under section 136 of the Act. Registered codes are on the ACA website at www.aca.gov.au/telcomm/industry_codes/register_of_codes/codint.htm or contact the ACA.

CHECKLIST

Before submitting a code to the ACA for registration, check that the following documentation has been provided with the application:

Documents

- Printed copy of the code in its final version.
- Electronic copy of the code on computer disc in word, rich text format (RTF) or portable document format (PDF).
- Explanatory Statement to the code.
- Supporting evidence of the industry body's claim to represent the section or sections of the industry to which the code relates.
- Details of participants in the section of the industry who are not members of the industry body.
- Where the code is replacing a currently registered code, a summary of the amendments to the currently registered code.
- Evidence of invitations to participants in each of the relevant section or sections of the industry to make submissions on the draft code and the methods of extending those invitations; or evidence of the participation of all members of the section or sections of the industry in the body.
- Evidence of invitations to the public to make submissions on the draft code and the methods of extending those invitations.
- Evidence of publication of the draft code including the ways in which the code was made available and charges if any.
- Evidence of the period of time, including dates of publication of invitations to comment, during which the body received submissions.
- A list of industry submitters, summaries of the comments provided and the consideration given to comments.
- A list of public submitters, summaries of the comments provided and the consideration given to comments.
- A summary of consideration given to the comments provided by the ACCC, the TIO and at least one consumer representative organisation(s).
- Where the code deals with a matter under paragraph 113(3)(f) of the *Telecommunications Act 1997* (a telecommunications privacy code), a summary of consideration given to the comments provided by the Privacy Commissioner.
- An accurate reference to all documents referenced by the code, for example technical standards, voluntary standards or guidelines.

Forms

- Completed and signed *Application for registration of telecommunications industry code* attached to the front of the application.
- One completed and signed *Certificate of mandatory consultation on industry code under Part 6 of the Telecommunications Act 1997* from **each** of the ACCC, the TIO and at least one consumer representative body.
- Where the code deals with a matter under paragraph 113(3)(f) of the *Telecommunications Act 1997* (a telecommunications privacy code), or with a matter related to the National Privacy Principles or a code approved under the Privacy Act, one completed and signed *Certificate of mandatory consultation on industry code under Part 6 of the Telecommunications Act 1997* from the Privacy Commissioner.

MORE INFORMATION

The Australian Communications Authority

For advice on the development or registration of telecommunications industry codes under Part 6 of the *Telecommunications Act 1997*, contact the ACA at:

Street address:

Level 13, 200 Queen Street
Melbourne VIC 3000

Postal address:

PO Box 13112 Law Courts
Melbourne VIC 8010

Tel: (03) 9963 6800

Fax: (03) 9963 6899

Email: industry.codes@aca.gov.au

Website: www.aca.gov.au

Other agencies:

Australian Competition and Consumer Commission

PO Box 1199

Dickson ACT 2602

Tel: (02) 6243 1111

Fax: (02) 6243 1199

Hotline: 1300 302 502

Website: www.accc.gov.au

Office of the Federal Privacy Commissioner

GPO Box 5218

Sydney NSW 1042

Tel: (02) 9284 9800

Fax: (02) 9284 9666

TTY (toll free): 1800 620 241

Privacy hotline: 1300 363 992

Email: privacy@privacy.gov.au

Website: www.privacy.gov.au

Telecommunications Industry Ombudsman

PO Box 276 Collins Street West

Melbourne VIC 8007

Tel: (03) 8600 8700

Fax: (03) 8600 8797

Toll free: 1800 062 058

Toll free fax: 1800 630 614

TTY (toll free): 1800 675 692

Email: tio@tio.com.au

Website: www.tio.com.au

REFERENCE

Australian Competition and Consumer Commission

- *Authorisations and notifications* (May 1999) (at www.accc.gov.au/fs-pubs.htm)
- *Benchmarks for dispute avoidance and resolution – a guide* (October 1997) (at www.accc.gov.au/docs/bench/httoc.htm)

Department of the Treasury – Consumer Affairs Division

- *Benchmarks for industry-based customer dispute resolution schemes* (October 1997) (at www.selfregulation.gov.au/publications/BenchmarksForIndustry-BasedCustomerDisputeResolutionSchemes/index.asp)

Ministerial Council on Consumer Affairs

- *Fair trading codes of conduct: Why have them. How to prepare them. A guide prepared by Commonwealth, State and Territory Consumer Affairs Agencies* (June 1998)

Standards Australia

AS 3806-1998 Compliance programs

AS 4269-1995 Complaints handling

Office of Regulation Review

A Guide to Regulation – Second Edition: December 1998 (at www.pc.gov.au/orr/reguide2/reguide2.pdf)

Disclaimer

The information provided in this publication should be taken as a guide only and does not in any way either represent ACA advice on specific circumstances, or limit the matters to which the ACA may have regard in exercising its decision making powers in relation to the registration of industry codes under Part 6 of the *Telecommunications Act 1997*.

PART 6 – INDUSTRY CODES AND INDUSTRY STANDARDS

DIVISION 1—SIMPLIFIED OUTLINE

106 Simplified outline

The following is a simplified outline of this Part.

- Bodies and associations that represent sections of the telecommunications industry may develop industry codes.
- Industry codes may be registered by the ACA.
- Compliance with an industry code is voluntary unless the ACA directs a particular participant in the telecommunications industry to comply with the code.
- The ACA has a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient.
- Compliance with industry standards is mandatory.

DIVISION 2—INTERPRETATION

107 Industry codes

For the purposes of this Part, an **industry code** is a code developed under this Part (whether or not in response to a request under this Part).

108 Industry standards

For the purposes of this Part, an **industry standard** is a standard determined under this Part.

109 Telecommunications activity

For the purposes of this Part, a **telecommunications activity** is an activity that consists of:

- (a) carrying on business as a carrier; or
- (b) carrying on business as a carriage service provider; or
- (c) supplying goods or services for use in connection with the supply of a listed carriage service; or
- (d) supplying a content service using a listed carriage service; or
- (e) manufacturing or importing customer equipment or customer cabling; or
- (f) installing, maintaining, operating or providing access to:
 - (i) a telecommunications network; or
 - (ii) a facility;
 used to supply a listed carriage service.

110 Sections of the telecommunications industry

- (1) For the purposes of this Part, **sections of the telecommunications industry** are to be ascertained in accordance with this section.
- (2) For the purposes of this Part, each of the following groups is a **section of the telecommunications industry**:
 - (a) carriers;
 - (b) service providers;
 - (c) carriage service providers;
 - (d) carriage service providers who supply standard telephone services;
 - (e) carriage service providers who supply public mobile telecommunications services;
 - (f) content service providers;
 - (g) persons who perform cabling work (within the meaning of Division 9 of Part 21);
 - (h) persons who manufacture or import customer equipment or customer cabling.
- (3) The ACA may, by written instrument, determine that persons carrying on, or proposing to carry on, one or more specified kinds of telecommunications activity constitute a section of the telecommunications industry for the purposes of this Part.
- (4) The section must be identified in the determination by unique name and/or number.
- (5) A determination under subsection (3) has effect accordingly.
- (6) Sections of the telecommunications industry determined under subsection (3):
 - (a) need not be mutually exclusive; and
 - (b) may consist of the aggregate of any 2 or more sections of the telecommunications industry mentioned in subsection (2) or determined under subsection (3); and
 - (c) may be subsets of a section of the telecommunications industry mentioned in subsection (2) or determined under subsection (3).
- (7) Subsection (6) does not, by implication, limit subsection (3).
- (8) A copy of a determination under subsection (3) is to be published in the *Gazette*.

111 Participants in a section of the telecommunications industry

For the purposes of this Part, if a person is a member of a group that constitutes a section of the telecommunications industry, the person is a **participant** in that section of the telecommunications industry.

DIVISION 3—GENERAL PRINCIPLES RELATING TO INDUSTRY CODES AND INDUSTRY STANDARDS

112 Statement of regulatory policy

- (1) The Parliament intends that bodies or associations that the ACA is satisfied represent sections of the telecommunications industry should develop codes (**industry codes**) that are to apply to participants in the respective sections of the industry in relation to the telecommunications activities of the participants.
- (2) The Parliament intends that the ACA, in exercising its powers under sections 117, 118, 119, 123, 124 and 125, will act in a manner that, in the opinion of the ACA, enables public interest considerations to be addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telecommunications industry.
- (3) In determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in sections of the telecommunications industry, the ACA must have regard to:
 - (a) the number of customers who would be likely to benefit from the code or standard concerned; and
 - (b) the extent to which those customers are residential or small business customers; and
 - (c) the legitimate business interests of participants in sections of the telecommunications industry; and
 - (d) the public interest, including the public interest in the efficient, equitable and ecologically sustainable supply of:
 - (i) carriage services; and
 - (ii) goods for use in connection with carriage services; and
 - (iii) services for use in connection with carriage services;

in a manner that reflects the legitimate expectations of the Australian community.

- (4) Subsection (3) does not, by implication, limit the matters to which regard may be had.

113 Examples of matters that may be dealt with by industry codes and industry standards

- (1) This section sets out examples of matters that may be dealt with by industry codes and industry standards.
- (2) The applicability of a particular example will depend on which section of the telecommunications industry is involved.

- (3) The examples are as follows:
 - (a) telling customers about:
 - (i) goods or services on offer; and
 - (ii) the prices of those goods or services; and
 - (iii) the other terms and conditions on which those goods or services are offered;
 - (b) giving customers information about performance indicators customers can use to evaluate the quality of services;
 - (c) regular reporting to customers about performance against those performance indicators;
 - (d) the internal handling of customer complaints;
 - (e) reporting about customer complaints;
 - (f) privacy and, in particular:
 - (i) the protection of personal information; and
 - (ii) the intrusive use of telecommunications by carriers or service providers; and
 - (iii) the monitoring or recording of communications; and
 - (iv) calling number display; and
 - (v) the provision of directory products and services;
 - (g) the “churning” of customers;
 - (h) security deposits given by customers;
 - (i) debt collection practices;
 - (j) customer credit practices;
 - (k) disconnection of customers;
 - (l) ensuring that customers have an informed basis on which to enter into agreements of a kind mentioned in paragraph 22(2)(d) or (e) or (4)(a) (which deal with boundaries of telecommunications networks);
 - (m) the quality of standard telephone services;
 - (n) the accuracy of billing of customers of carriage service providers in relation to the supply of standard telephone services;
 - (o) the timeliness and comprehensibility of bills;
 - (p) the procedures to be followed in order to generate standard billing reports to assist in the investigation of customer complaints about bills.

114 Industry codes and industry standards may confer powers on the Telecommunications Industry Ombudsman

- (1) If the Telecommunications Industry Ombudsman consents, an industry code or industry standard may confer functions and powers on the Telecommunications Industry Ombudsman.
- (2) The continuity of a consent under subsection (1) is not affected by:
 - (a) a change in the occupancy of the position of Telecommunications Industry Ombudsman; or
 - (b) a vacancy in the position of Telecommunications Industry Ombudsman that does not continue for more than 4 months.

115 Industry codes and industry standards not to deal with certain design features and performance requirements

- (1) For the purposes of this Part, an industry code or an industry standard has no effect:
- (a) to the extent (if any) to which compliance with the code or standard is likely to have the effect (whether direct or indirect) of requiring customer equipment, customer cabling, a telecommunications network or a facility:
 - (i) to have particular design features; or
 - (ii) to meet particular performance requirements;or
 - (b) to the extent (if any) to which it deals with the content of content services.
- (2) The rule in subsection (1) does not apply to an industry code or an industry standard to the extent (if any) to which compliance with the code or standard is likely:
- (a) to have the indirect effect of requiring customer equipment, customer cabling, a telecommunications network or a facility to have particular design features that relate to:
 - (i) the accuracy of billing of customers of carriage service providers in relation to the supply of standard telephone services; or
 - (ii) the quality of standard telephone services; or
 - (iii) a matter specified in the regulations; or
 - (b) to have the direct or indirect effect of requiring customer equipment, customer cabling, a telecommunications network or a facility to meet performance requirements that relate to:
 - (i) the accuracy of billing of customers of carriage service providers in relation to the supply of standard telephone services; or
 - (ii) the quality of standard telephone services; or
 - (iii) a matter specified in the regulations.
- (3) The rule in subsection (1) does not apply to an industry code or an industry standard to the extent (if any) to which the code or standard deals with a matter referred to in paragraph 113(3)(f).

116 Industry codes and industry standards not to deal with matters dealt with by codes and standards under Part 9 of the Broadcasting Services Act

For the purposes of this Part, an industry code or an industry standard that deals with a matter relating to a content service has no effect to the extent (if any) to which the matter is dealt with by a code registered, or standard determined, under Part 9 of the *Broadcasting Services Act 1992*.

116A Industry codes and standards do not affect Privacy Act 1988

Neither an industry code nor an industry standard derogates from a requirement made by or under the *Privacy Act 1988* or an approved privacy code (as defined in that Act).

DIVISION 4—INDUSTRY CODES

117 Registration of industry codes

- (1) This section applies if:
- (a) the ACA is satisfied that a body or association represents a particular section of the telecommunications industry; and
 - (b) that body or association develops an industry code that applies to participants in that section of the industry and deals with one or more matters relating to the telecommunications activities of those participants; and
 - (c) the body or association gives a copy of the code to the ACA; and
 - (d) the ACA is satisfied that:
 - (i) in a case where the code deals with matters of substantial relevance to the community—the code provides appropriate community safeguards for the matters covered by the code; or
 - (ii) in a case where the code does not deal with matters of substantial relevance to the community—the code deals with the matters covered by the code in an appropriate manner; and
 - (e) the ACA is satisfied that, before giving the copy of the code to the ACA:
 - (i) the body or association published a draft of the code and invited participants in that section of the industry to make submissions to the body or association about the draft within a specified period; and
 - (ii) the body or association gave consideration to any submissions that were received from participants in that section of the industry within that period; and
 - (f) the ACA is satisfied that, before giving the copy of the code to the ACA:
 - (i) the body or association published a draft of the code and invited members of the public to make submissions to the body or association about the draft within a specified period; and
 - (ii) the body or association gave consideration to any submissions that were received from members of the public within that period; and
 - (g) the ACA is satisfied that the ACCC has been consulted about the development of the code; and
 - (h) the ACA is satisfied that the Telecommunications Industry Ombudsman has been consulted about the development of the code; and

- (i) the ACA is satisfied that at least one body or association that represents the interests of consumers has been consulted about the development of the code; and
 - (j) in a case where the code deals with a matter set out in paragraph 113(3)(f)—the ACA is satisfied that the Privacy Commissioner has been consulted by the body or association about the development of the code before the body or association gave the copy of the code to the ACA; and
 - (k) the ACA has consulted the Privacy Commissioner about the code and consequently believes that he or she is satisfied with the code, if the code deals directly or indirectly with a matter dealt with by:
 - (i) the National Privacy Principles (as defined in the *Privacy Act 1988*); or
 - (ii) other provisions of that Act that relate to those Principles; or
 - (iii) an approved privacy code (as defined in that Act) that binds a participant in that section of the telecommunications industry; or
 - (iv) provisions of that Act that relate to the approved privacy code.
- (2) The ACA must register the code by including it in the Register of industry codes kept under section 136.
- (3) A period specified under subparagraph (1)(e)(i) or (1)(f)(i) must run for at least 30 days.
- (4) If:
- (a) an industry code (the **new code**) is registered under this Part; and
 - (b) the new code is expressed to replace another industry code;

the other code ceases to be registered under this Part when the new code is registered.

Note: An industry code also ceases to be registered when it is removed from the Register of industry codes under section 122A.

118 ACA may request codes

- (1) If the ACA is satisfied that a body or association represents a particular section of the telecommunications industry, the ACA may, by written notice given to the body or association, request the body or association to:
- (a) develop an industry code that applies to participants in that section of the industry and deals with one or more specified matters relating to the telecommunications activities of those participants; and
 - (b) give the ACA a copy of the code within the period specified in the notice.

Note: The ACA may request the body or association to develop the industry code to replace an earlier industry code that the Privacy Commissioner (exercising functions under the *Privacy Act 1988*) has advised the ACA is inconsistent with the National Privacy Principles or a relevant approved privacy code (as defined in that Act).

- (2) The period specified in a notice under subsection (1) must run for at least 120 days.
- (3) The ACA must not make a request under subsection (1) in relation to a particular section of the telecommunications industry unless the ACA is satisfied that:
 - (a) the development of the code is necessary or convenient in order to:
 - (i) provide appropriate community safeguards; or
 - (ii) otherwise deal with the performance or conduct of participants in that section of the industry; and
 - (b) in the absence of the request, it is unlikely that an industry code would be developed within a reasonable period.
- (4) The ACA must not make a request under subsection (1) in relation to a code if:
 - (a) the code would deal with a matter referred to in paragraph 113(3)(f) (which relates to privacy); and
 - (b) compliance with the code would be likely to have the effect (whether direct or indirect) of requiring customer equipment, customer cabling, a telecommunications network or a facility:
 - (i) to have particular design features; or
 - (ii) to meet particular performance requirements.

However, this rule does not apply if the ACA is satisfied that the benefits to the community from the operation of the code would outweigh the costs of compliance with the code.
- (4A) The ACA must consult the Privacy Commissioner before making a request under subsection (1) for the development of an industry code that could reasonably be expected to deal directly or indirectly with a matter dealt with by:
 - (a) the National Privacy Principles (as defined in the *Privacy Act 1988*); or
 - (b) other provisions of that Act relating to those Principles; or
 - (c) an approved privacy code (as defined in that Act) that binds one or more participants in the section of the telecommunications industry to which the request relates; or
 - (d) provisions of that Act that relate to the approved privacy code.
- (5) The ACA may vary a notice under subsection (1) by extending the period specified in the notice.
- (6) Subsection (5) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.
- (7) A notice under subsection (1) may specify indicative targets for achieving progress in the development of the code (for example, a target of 60 days to develop a preliminary draft of the code).

119 Publication of notice where no body or association represents a section of the telecommunications industry

- (1) If the ACA is satisfied that a particular section of the telecommunications industry is not represented by a body or association, the ACA may publish a notice in the *Gazette*:
 - (a) stating that, if such a body or association were to come into existence within a specified period, the ACA would be likely to give a notice to that body or association under subsection 118(1); and
 - (b) setting out the matter or matters relating to telecommunications activities that would be likely to be specified in the subsection 118(1) notice.
- (2) The period specified in a notice under subsection (1) must run for at least 60 days.

120 Replacement of industry codes

- (1) Changes to an industry code are to be achieved by replacing the code instead of varying the code.

However, this does not prevent the ACA from removing under section 122A an industry code, or a provision of an industry code, from the Register of industry codes kept under this Part.

- (2) If the replacement code differs only in minor respects from the original code, section 117 has effect, in relation to the registration of the code, as if paragraphs 117(1)(e) and (f) had not been enacted.

Note: Paragraphs 117(1)(e) and (f) deal with submissions about draft codes.

121 Directions about compliance with industry codes

- (1) If:
 - (a) a person is a participant in a particular section of the telecommunications industry; and
 - (b) the ACA is satisfied that the person has contravened or is contravening an industry code that:
 - (i) is registered under this Part; and
 - (ii) applies to participants in that section of the industry;

the ACA may, by written notice given to the person, direct the person to comply with the industry code.

- (1A) If the ACA is satisfied that the contravention of the industry code relates directly or indirectly to a matter dealt with by the National Privacy Principles (as defined in the *Privacy Act 1988*) or by an approved privacy code (as defined in that Act), the ACA must consult the Privacy Commissioner before giving the direction.
- (2) A person must comply with a direction under subsection (1).
- (3) A person must not:
 - (a) aid, abet, counsel or procure a contravention of subsection (2); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (2); or

- (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (2); or
 - (d) conspire with others to effect a contravention of subsection (2).
- (4) Subsections (2) and (3) are **civil penalty provisions**.
- Note: Part 31 provides for pecuniary penalties for breaches of civil penalty provisions.

122 Formal warnings—breach of industry codes

- (1) This section applies to a person who is a participant in a particular section of the telecommunications industry.
- (2) The ACA may issue a formal warning if the person contravenes an industry code registered under this Part.
- (3) If the ACA is satisfied that the contravention of the industry code relates directly or indirectly to a matter dealt with by the National Privacy Principles (as defined in the *Privacy Act 1988*) or by an approved privacy code (as defined in that Act), the ACA must consult the Privacy Commissioner before issuing the warning.

122A De-registering industry codes and provisions of industry codes

- (1) The ACA may remove from the Register of industry codes kept under section 136:
 - (a) an industry code; or
 - (b) a provision of an industry code.
- (2) An industry code ceases to be registered when it is removed from the Register.
- (3) If the ACA removes a provision of an industry code from the Register, this Part has effect in relation to things occurring after the removal of the provision as if the code registered under this Part did not include the provision removed.

DIVISION 5—INDUSTRY STANDARDS

123 ACA may determine an industry standard if a request for an industry code is not complied with

- (1) This section applies if:
 - (a) the ACA has made a request under subsection 118(1) in relation to the development of a code that is to:
 - (i) apply to participants in a particular section of the telecommunications industry; and
 - (ii) deal with one or more matters relating to the telecommunications activities of those participants; and
 - (b) any of the following conditions is satisfied:
 - (i) the request is not complied with;
 - (ii) if indicative targets for achieving progress in the development of the code were specified in the notice of request—any of those indicative targets were not met;
 - (iii) the request is complied with, but the ACA subsequently refuses to register the code; and

- (c) the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard in order to:
 - (i) provide appropriate community safeguards in relation to that matter or those matters; or
 - (ii) otherwise regulate adequately participants in that section of the industry in relation to that matter or those matters.
- (2) The ACA may, by written instrument, determine a standard that applies to participants in that section of the industry and deals with that matter or those matters. A standard under this subsection is to be known as an **industry standard**.
- (3) Before determining an industry standard under this section, the ACA must consult the body or association to whom the request mentioned in paragraph (1)(a) was made.
- (4) A standard under subsection (2) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

124 ACA may determine industry standard where no industry body or association formed

- (1) This section applies if:
 - (a) the ACA is satisfied that a particular section of the telecommunications industry is not represented by a body or association; and
 - (b) the ACA has published a notice under subsection 119(1) relating to that section of the industry; and
 - (c) that notice:
 - (i) states that, if such a body or association were to come into existence within a particular period, the ACA would be likely to give a notice to that body or association under subsection 118(1); and
 - (ii) sets out one or more matters relating to the telecommunications activities of the participants in that section of the industry; and
 - (d) no such body or association comes into existence within that period; and
 - (e) the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard in order to:
 - (i) provide appropriate community safeguards in relation to that matter or those matters; or
 - (ii) otherwise regulate adequately participants in that section of the industry in relation to that matter or those matters.
- (2) The ACA may, by written instrument, determine a standard that applies to participants in that section of the industry and deals with that matter or those matters. A standard under this subsection is to be known as an **industry standard**.
- (3) A standard under subsection (2) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

125 ACA may determine industry standards where industry codes fail

- (1) This section applies if:
 - (a) an industry code that:
 - (i) applies to participants in a particular section of the telecommunications industry; and
 - (ii) deals with one or more matters relating to the telecommunications activities of those participants;
- has been registered under this Part for at least 180 days; and
- (b) the ACA is satisfied that the code is deficient (as defined by subsection (7)); and
- (c) the ACA has given the body or association that developed the code a written notice requesting that deficiencies in the code be addressed within a specified period; and
- (d) that period ends and the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard that applies to participants in that section of the industry and deals with that matter or those matters.
- (2) The period specified in a notice under paragraph (1)(c) must run for at least 30 days.
- (3) The ACA may, by written instrument, determine a standard that applies to participants in that section of the industry and deals with that matter or those matters. A standard under this subsection is to be known as an **industry standard**.
- (4) If the ACA is satisfied that a body or association represents that section of the industry, the ACA must consult the body or association before determining an industry standard under subsection (3).
- (5) A standard under subsection (3) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.
- (6) The industry code ceases to be registered under this Part on the day on which the industry standard comes into force.
- (7) For the purposes of this section, an industry code that applies to participants in a particular section of the telecommunications industry and deals with one or more matters relating to the telecommunications activities of those participants is **deficient** if, and only if:
 - (a) the code is not operating to provide appropriate community safeguards in relation to that matter or those matters; or
 - (b) the code is not otherwise operating to regulate adequately participants in that section of the industry in relation to that matter or those matters.

126 Industry standards not to be determined for certain privacy matters

The ACA must not determine an industry standard if:

- (a) the standard would deal with a matter referred to in paragraph 113(3)(f) (which relates to privacy); and
- (b) compliance with the standard would be likely to have the effect (whether direct or indirect) of requiring customer equipment, customer cabling, a telecommunications network or a facility:
 - (i) to have particular design features; or
 - (ii) to meet particular performance requirements.

However, this rule does not apply if the ACA is satisfied that the benefits to the community from the operation of the standard would outweigh the costs of compliance with the standard.

127 Industry standards not to be determined during the first 180 days after commencement

The ACA must not determine an industry standard during the first 180 days after the commencement of this section.

128 Compliance with industry standards

- (1) If an industry standard that applies to participants in a particular section of the telecommunications industry is registered under this Part, each participant in that section of the industry must comply with the standard.
- (2) A person must not:
 - (a) aid, abet, counsel or procure a contravention of subsection (1); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (1); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (1); or
 - (d) conspire with others to effect a contravention of subsection (1).
- (3) Subsections (1) and (2) are **civil penalty provisions**.

Note: Part 31 provides for pecuniary penalties for breaches of civil penalty provisions.

129 Formal warnings—breach of industry standards

- (1) This section applies to a person who is a participant in a particular section of the telecommunications industry.
- (2) The ACA may issue a formal warning if the person contravenes an industry standard registered under this Part.

130 Variation of industry standards

- (1) The ACA may, by written instrument, vary an industry standard that applies to participants in a particular section of the telecommunications industry if it is satisfied that it is necessary or convenient to do so to:
 - (a) provide appropriate community safeguards in relation to one or more matters relating to the telecommunications activities of those participants; and
 - (b) otherwise regulate adequately those participants in relation to one or more matters relating to the telecommunications activities of those participants.

Note: The ACA may be satisfied that it is necessary or convenient to vary an industry standard that is inconsistent with the National Privacy Principles or an approved privacy code (as defined in the *Privacy Act 1988*), following advice given by the Privacy Commissioner in the exercise of his or her functions under that Act.

- (2) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

131 Revocation of industry standards

- (1) The ACA may, by written instrument, revoke an industry standard.
- (2) If:
 - (a) an industry code is registered under this Part; and
 - (b) the code is expressed to replace an industry standard;the industry standard is revoked when the code is registered.
- (3) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

132 Public consultation on industry standards

- (1) Before determining or varying an industry standard, the ACA must:
 - (a) cause to be published in a newspaper circulating in each State a notice:
 - (i) stating that the ACA has prepared a draft of the industry standard or variation; and
 - (ii) stating that free copies of the draft will be made available to members of the public during normal office hours throughout the period specified in the notice; and
 - (iii) specifying the place or places where the copies will be available; and
 - (iv) inviting interested persons to give written comments about the draft to the ACA within the period specified under subparagraph (ii); and
 - (b) make copies of the draft available in accordance with the notice.

- (2) The period specified under subparagraph (1)(a)(ii) must run for at least 30 days after the publication of the notice.
- (3) Subsection (1) does not apply to a variation if the variation is of a minor nature.
- (4) If interested persons have given comments in accordance with a notice under subsection (1), the ACA must have due regard to those comments in determining or varying the industry standard, as the case may be.
- (5) In this section:
State includes the Northern Territory and the Australian Capital Territory.

133 Consultation with ACCC and the Telecommunications Industry Ombudsman

- (1) Before determining or varying an industry standard, the ACA must consult the ACCC and the Telecommunications Industry Ombudsman.
- (2) Before revoking an industry standard under subsection 131(1), the ACA must consult the ACCC and the Telecommunications Industry Ombudsman.

134 Consultation with Privacy Commissioner

- (1) This section applies to an industry standard that deals with a matter set out in paragraph 113(3)(f), including a matter dealt with by:
 - (a) the National Privacy Principles (as defined in the *Privacy Act 1988*); or
 - (b) other provisions of that Act relating to those Principles; or
 - (c) an approved privacy code (as defined in that Act); or
 - (d) provisions of that Act that relate to an approved privacy code.
- (2) Before determining or varying the industry standard, the ACA must consult the Privacy Commissioner.
- (3) Before revoking the industry standard under subsection 131(1), the ACA must consult the Privacy Commissioner.

135 Consultation with consumer body

- (1) Before determining or varying an industry standard, the ACA must consult at least one body or association that represents the interests of consumers.
- (2) Before revoking an industry standard under subsection 131(1), the ACA must consult at least one body or association that represents the interests of consumers.

DIVISION 6—REGISTER OF INDUSTRY CODES AND INDUSTRY STANDARDS

136 ACA to maintain Register of industry codes and industry standards

- (1) The ACA is to maintain a Register in which the ACA includes:
 - (a) all industry codes required to be registered under this Part; and
 - (b) all industry standards; and
 - (c) all requests made under section 118; and
 - (d) all notices under section 119; and
 - (e) all directions given under section 121.
- (1A) Paragraph (1)(a) does not require the ACA to continue to include in the Register an industry code, or a provision of an industry code, removed from the Register under section 122A.
- (2) The Register may be maintained by electronic means.
- (3) A person may, on payment of the charge (if any) fixed by a determination under section 53 of the *Australian Communications Authority Act 1997*:
 - (a) inspect the Register; and
 - (b) make a copy of, or take extracts from, the Register.
- (4) For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the ACA gives the person a printout of, or of the relevant parts of, the Register.
- (5) If a person requests that a copy be provided in an electronic form, the ACA may provide the relevant information:
 - (a) on a data processing device; or
 - (b) by way of electronic transmission.

APPENDIX B: APPLICATION FOR REGISTRATION OF TELECOMMUNICATIONS INDUSTRY CODE



Purpose

This form should be completed and provided in conjunction with a telecommunications industry code which is being submitted by an industry body to the Australian Communications Authority (ACA) for registration under subsection 117(1)(c) of the *Telecommunications Act 1997* (the Act).

Note to industry body

Provision of this form should conform to the following requirements:

a) Questions on this form marked with an * require the provision of supporting documentation. This documentation is required by the ACA in order for the ACA to be satisfied that the requirements of section 117 have been met. Where industry codes are submitted without the required documentation, the ACA is unable to be satisfied the provisions of section 117 have been met and hence unable to register the code.

b) Due to the poor quality of some facsimile transmissions, the ACA does not accept code registration applications by facsimile machine. Applications should be posted to the ACA at:

*Telecommunications Industry Code Registration Application
Australian Communications Authority
PO Box 13112 Law Courts
Melbourne VIC 8010*

or delivered by courier or by hand to the ACA at
Level 13 200 Queen Street Melbourne VIC 3000

More information

For more information about the ACA's telecommunications industry code registration requirements, please see the ACA publication *Developing Telecommunications Codes for Registration - A Guide* or contact the ACA on (03) 9963 6800.

Application

1. Title of code

2. Date of code

3. Name of industry body or association providing the code

7. Code registration application on disc

ATTACHED

8. Was the code requested by the ACA under section 118 of the Act?

YES NO

9. Code Explanatory Statement *

ATTACHED

10. The section(s) of the industry which the code covers

(SEE SECTION 110 OF THE ACT)

11. The telecommunications activity(ies) covered by the code

(SEE SECTION 109 OF THE ACT)

4. Contact officer

5. Phone number

6. Postal address

POSTCODE

12. The industry body – representing the industry. *

PLEASE ATTACH DOCUMENTARY EVIDENCE DEMONSTRATING THAT THE INDUSTRY BODY REPRESENTS EACH OF THE SECTIONS OF THE TELECOMMUNICATIONS INDUSTRY LISTED AT QUESTION 10.

SUITABLE EVIDENCE COULD INCLUDE ONE, OR COMBINATIONS, OF THE FOLLOWING:

- membership data verifying membership of all or a majority of the participants in a section of the industry;
- verification of affiliations between the body and other industry bodies which also subscribe to the code, with the combined membership forming a majority of the participants in the section;
- membership data verifying membership of key industry players, which collectively provide a representative cross sample of the section or sections of the industry, in relevant areas such as market share and products and services; or
- any other information that will assist the ACA in deciding whether the industry body represents the particular section or sections of the industry.

13. List of industry participants in each section of the industry covered by the code which are not members of the industry body. *

14. Is the code intended to replace a code registered with the ACA under section 136 of the Act?

NO YES

If YES, name of currently registered code

(ATTACH SUMMARY OF AMENDMENTS TO THE CURRENTLY REGISTERED CODE WHICH ARE CONTAINED IN THIS CODE.) *

15. Was consultation on the code undertaken with participants in the affected section(s) of the industry and the public under paragraphs 117(1)(e) and (f) of the Act?

YES NO – GO TO QUESTION 17

16. Publication of the draft code * (PLEASE ATTACH DOCUMENTATION DEMONSTRATING THE METHOD OF PUBLISHING THE DRAFT CODE.)

Documentation must include evidence of the following:

- invitations to participants in each of the relevant section or sections of the industry to make submissions on the draft code; or
- the participation of all members of a section of the industry in the industry body; and
- invitations to the public to make submissions on the draft code;
- the methods of extending invitations to the industry and the public, such as advertisements posted in newspapers, industry periodicals and the mass media;
- publication of the draft code, including the ways in which the code was made available and any fees charged; and
- the period of time, including dates, during which the body received submissions.

17. Summary of submissions from participants in the industry and the public. *

Summaries must include the following:

- a list of all submitters;
- summaries of all the comments provided;
- summaries of how the comments were incorporated into the code; and
- if the comments were rejected, summaries of the reasons why the submissions were rejected.

18. Consultation with the ACCC, TIO and consumer body(ies) or association(s) *Certificate of mandatory consultation on industry code under Part 6 of the Telecommunications Act 1997* from each of the following agencies attached. *

ACCC TIO CONSUMER BODY(IES) OR ASSOCIATION(S)

Name of consumer body(ies) or association(s) consulted

19. Does the code cover a matter at paragraph 113(3)(f) of the Act or a matter related to the National Privacy Principles or a code approved under the Privacy Act?

NO YES

If YES *Certificate of mandatory consultation on industry code under Part 6 of the Telecommunications Act 1997* from the Privacy Commissioner attached. *

Note:

Responses to questions 17, 18 and 19 must be provided in conjunction with one completed copy of the form *Certificate of mandatory consultation on industry code under Part 6 of the Telecommunications Act 1997* from each of the agencies. Forms must be completed by the agency providing the comment.

20. Consideration given to comments provided by the ACCC, TIO and consumer body(ies) or association(s) and (where relevant) Privacy Commissioner. * (attach summary of the consideration given by the industry body to comments provided by each agency. Summaries must include both comments incorporated and not incorporated in the final code and of the consideration given to them)

Declaration

I hereby declare that I am authorised by

--

(NAME OF INDUSTRY BODY)

to give a copy of the above code to the ACA in accordance with paragraph 117(1)(c) of the *Telecommunications Act 1997*. I am aware that it is an offence under section 29B of the *Crimes Act 1914* (Cth) to make untrue representations to the Commonwealth or a public authority under the Commonwealth with a view to obtaining a benefit or advantage.

Signature

--

Date

--

--

NAME (PLEASE PRINT)

--

TITLE (PLEASE PRINT)

APPENDIX C: CERTIFICATE OF MANDATORY CONSULTATION ON INDUSTRY CODE



Under Part 6 of the *Telecommunications Act 1997*

Purpose of this form

This form is for the use of industry bodies submitting code registration applications to the ACA under paragraph 117(1)(c) of the *Telecommunications Act 1997* (the Act). It is designed to enable industry bodies to substantiate that consultation was undertaken on the industry code under paragraphs 117(1)(g), (h), (i) and (j) of the Act. One completed copy of the form from each of the ACCC, TIO, at least one consumer representative body or association and (where required) the Privacy Commissioner should be provided by industry bodies to the ACA as part of each application for code registration.

Note to industry body

A copy of this form should be completed and signed by each of the agencies consulted by the industry body under paragraphs 117(1)(g), (h), (i) and (j) as required by the Act. The industry body should then

obtain one completed from each agency and provide them to the ACA with the industry body's code registration application for the relevant code. Applications for code registration should be made on the form *Application for registration of telecommunications industry code* and should conform with the ACA's requirements as detailed on that form and in the ACA publication *Developing Telecommunications Codes for Registration - A Guide*.

Note to certifying agency

This certificate must be completed and signed by an officer of the agency at an appropriate level. It should be accompanied where necessary with further comments from the agency on agency letterhead. The formal comment provided on this form must be on a final draft of the code concerned.

Agency Consulted

- Australian Competition and Consumer Commission (ACCC)
- Telecommunications Industry Ombudsman (TIO)
- Privacy Commissioner
- Consumer representative body(ies) or association(s)

Name of consumer body or association

1. Name of code sighted

2. Draft/version and date of code sighted

3. Date(s) of consultation

4. Comments provided by the agency on the code (PLEASE ATTACH SUMMARY OF COMMENTS ON AGENCY LETTERHEAD)

5. Does the code adequately address the agency's comments?

- YES NO - PLEASE ATTACH COMMENTS.

6. Are there any outstanding issues raised by the agency which are not addressed by the code?

- NO YES - PLEASE ATTACH COMMENTS.

7. ACCC only

(a) Restrictive trade practices

Is a provision of the code at risk of breaching the restrictive trade practices provisions of the *Trade Practices Act 1974*?

(b) Consumer protection

Is the proposed code consistent with provisions of the *Trade Practices Act 1974* dealing with consumer protection matters?

(c) Codes of conduct registered under the *Trade Practices Act 1974*

Is the proposed code consistent with other codes imposed by regulation under Part IVB of the *Trade Practices Act 1974*?

(d) Authorisation application or notification of exclusive dealing

Has an application for authorisation or notification of exclusive dealing pursuant to part VII of the *Trade Practices Act 1974* been lodged?

(e) Authorisation status of the code.

- Authorisation application is outstanding.
- Authorisation granted.
- Authorisation rejected.
- Authorisation not being sought as it has not been recommended.

PLEASE ATTACH COMMENTS IF REQUIRED.

APPENDIX D: CODE DRAFTING PRINCIPLES

Because registered codes are a form of regulation under the *Telecommunications Act 1997*, they must be drafted in accordance with certain legal drafting principles.

Drafting documents according to legal drafting principles is a specialised skill. Industry bodies should consider obtaining assistance from a person or organisation with the appropriate level of legal drafting expertise before a code is submitted to the ACA for registration, to ensure that it conforms to legal drafting principles.

The following generic principles are provided as a brief guide to the legal drafting principles that an industry body should follow when drafting a code. They are not a substitute for specialised legal drafting advice.

Structure

- Assess the structure of the document as a whole. Look at each constituent part to see how it contributes to the whole document.
- The most important issues should come at the beginning of the code.
- Make sure that the code has a natural order and flows from one provision to another.
- Use structuring tools to achieve clarity such as:
 - paragraphing, definitions and punctuation;
 - schedules, plans and appendices.
- Keep words, sentences and provisions short.
- Use headings to clearly signal issues and subjects.
- Don't use sub-subparagraphs.
- Number paragraphs.

Language

- Keep language simple by avoiding long and uncommon words.
- Use plain English where possible as this will aid understanding for all readers.

Definitions

- Use definitions in the following situations:
 - when a word has broader than usual meaning;
 - when a word has a narrower meaning than usual;
 - if the meaning of the word is uncertain;
 - for technical terms not normally used outside the industry; and
 - in place of cross-references.
- Defined terms used in the body of the code must be able to be substituted for the full definition in each case. If definitions cannot be substituted then the definition may have to be changed.
- Consider the following when framing a definition:
 - is this a different meaning to normal?
 - what would others in the industry understand?
 - what would consumers understand?

Changing defined terms

- Try not to change the meaning of a defined term in other parts of the document.
- Where the meaning of defined terms change, repeat the defined term in each section with the qualification.

What should definitions not do?

- Do not use definitions as substitutes for substantive provisions.
- Do not try to impose conditions in definitions.
- Do not omit substantive provisions altogether.

Precedents

- Borrow precedents with care. A precedent has usually been drafted for a different purpose and may contain unsuitable information or unsuitable definitions.

Style

- Avoid bullet points in codes. Number all paragraphs.
- Avoid visually distracting paragraphs.
- Use short provisions and subprovisions.
- If there are up to four or five subprovisions in a provision consider splitting the provision into two or more provisions.

Time

- Define periods of time in the following manner:
 - 30 days, commencing on the day after...
 - within a period of 30 days, including the day on which...
 - on and from the day on which...

When drafting is finished

- Check, check, and check it again.
- Look for:
 - order and arrangement of provisions;
 - consistency of language;
 - accuracy of references and cross-references;
 - correct numbering of clauses and paragraphs; and
 - spelling and punctuation.

APPENDIX E: DRAFTING CHECKLIST – WHAT CODES MUST CONTAIN

Application of the code

- the name of the code;
- the name of the industry body which is initiating and administering the code;
- the date of commencement of the code;
- deal with one or more matters relating to telecommunications activities;
- the section or sections of the telecommunications industry to which the code applies.

Content

- consistent with the objects of the *Telecommunications Act 1997*;
- consistent with the provisions of the Act and with other legislation;
- consistent with codes already registered with the ACA;
- contains a comprehensive set of rules which are directed at achieving, and measuring the achievement of, the code objectives;
- rules are expressed predominantly in mandatory terms such as 'must' instead of 'should' or 'may';
- relates to a telecommunications activity, as defined in the Act;
- does not prescribe pecuniary penalties for breaches of code rules;
- does not include clauses that indemnify one party against loss suffered as a result of a breach of a code;
- if it references other documents, these clauses are appropriately drafted and with relevant documents clearly referenced or included;
- if it references bilateral agreements, these clauses are appropriately drafted;
- if it references agency agreements, these clauses are appropriately drafted.

Administration

- contains appropriate code administration, including provisions for complaint handling, sanctions, monitoring and review;
- specifies the complaint-handling body, what functions and powers will be undertaken, and which code provisions they relate to.

Consultation

- addresses the concerns of the groups and individuals consulted during the development of the code.

Replacement codes

- states clearly that the code is intended to replace a code already registered on the Section 136 Register.

APPENDIX F: BILATERAL CLAUSES

1. Where bilaterals are required under statute (e.g. *Trade Practices Act 1974*)

- Clause x.1 This code sets minimum acceptable practices, which do not unnecessarily limit industry's ability to improve on the minimum level. This code does not constrain two or more individual industry participants agreeing to different arrangements provided that those arrangements meet the minimum level defined in this code.
- Clause x.2 This code recognises that two or more individual participants will, as provided for under the *Trade Practices Act 1974* [or other relevant statute], enter into bilateral agreements in relation to matters covered by this code. However, such arrangements must not diminish the minimum requirements in this code or the *Trade Practices Act 1974* [or other relevant statute].
- Clause x.3 Such bilateral agreements should include, but are not limited to, the following matters:...

2. Where bilaterals are not required under statute

- Clause x.1 This code sets minimum acceptable practices, which do not unnecessarily limit industry's ability to improve on the minimum level. This code does not constrain two or more individual industry participants agreeing to different arrangements provided that those arrangements meet the minimum level defined in this code.
- Clause x.2 This code recognises that two or more individual participants may enter into bilateral agreements in relation to matters covered by this code. However, such arrangements must not diminish the minimum requirements in this code.
- Clause x.3 Such bilateral agreements should include, but are not limited to, the following matters:...

APPENDIX G: TEMPLATE FOR EXPLANATORY STATEMENT FOR AN INDUSTRY CODE

The Explanatory Statement performs a number of important functions in a code. It explains the purpose and intention of the code and provides the ACA with evidence on which it can assess whether the code meets the public interest balance test and whether it satisfies the requirements of the Office of Regulation Review (ORR).

In particular, the Explanatory Statement should contain sufficient information on which the ACA will be able to base a Regulatory Impact Statement (RIS). For more information on the requirements of a RIS please refer to the ORR's guide *A Guide to Regulation – Second Edition: December 1998*.

The ACA suggests that industry bodies use the following headings when drafting code Explanatory Statements.

Explanatory Statement

- 1 Background – statement of the problem or issue
- 2 Current regulatory arrangements
- 3 Why current regulatory arrangements are inadequate
- 4 How the code builds on and enhances the current regulatory arrangements
- 5 What the code will accomplish
- 6 How the objectives will be achieved
- 7 Anticipated benefits to consumers
- 8 Anticipated benefits to industry
- 9 Anticipated costs to industry
- 10 For codes with delayed implementation provisions, burdens to industry if the code commences immediately – including estimates of costs – and how these burdens are undue
- 11 Other public interest benefits or considerations

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*The Australian Communications Authority is
a government regulator of telecommunications
and radiocommunications.*