

Guide to developing and varying telecommunications codes for registration

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Introduction

This guide has been designed to assist industry bodies in writing industry codes for registration with the Australian Communications and Media Authority (the ACMA) under Part 6 (*Industry codes and Industry standards*) of the *Telecommunications Act 1997* (the Telecommunications Act). It outlines the ACMA's approach and procedures in relation to the codes that are presented to it by industry bodies for registration, either voluntarily, or following a request to develop a code by the ACMA under section 118 of the Telecommunications 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 Telecommunications Act and is intended to be read in conjunction with and subject to Part 6 of the Telecommunications Act.

Changes to the Telecommunications Act made in March 2014 also permit registered codes to be varied. This aims to streamline the process of updating or improving an industry code. While this guide is primarily focused on *developing* new codes, information about *varying* an existing code is also provided. In most cases, the same requirements and guidelines apply to developing or varying a code. This guide notes where substantive differences apply.

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

Attached to this guide are forms for demonstrating that the required consultation process in developing a code has been followed, and for applying for code registration with the ACMA. These two forms should be used when making an application to the ACMA for registration of a code. Forms for applying to the ACMA to vary a code are also available. The guide and the forms are also available on the [ACMA website](#).

Disclaimer:

The information provided in this publication should be taken as a guide only and does not in any way either represent the ACMA's advice on specific circumstances, or limit the matters to which the ACMA 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*.

Telecommunications industry codes

Outline of Part 6—Industry codes and industry standards

Among the objects of the Telecommunications Act are the promotion of the long term interests of end users of carriage services and the efficiency and international competitiveness of the Australian telecommunications industry. Parliament's intention includes that telecommunications be regulated in a manner which promotes the greatest practicable use of industry self-regulation. Part 6 of the Telecommunications 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 matters relating to telecommunications, telemarketing or fax marketing activity. These are defined widely in sections 109, 109B and 109C of the Telecommunications Act. Codes can be presented by industry bodies to the ACMA for registration and where the ACMA is satisfied that the code meets stipulated criteria at section 117 of the Telecommunications Act, 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 Telecommunications Act as a publicly accessible record of all registered codes.

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

Where the ACMA considers a code to be necessary or convenient to provide appropriate community safeguards or otherwise deal with the performance or conduct of the participants in the telecommunications, telemarketing or fax marketing industries, it may request that a representative industry body develop one and present it to the ACMA for registration. In the event that the code is not developed, or does not meet the registration criteria, the ACMA may develop an industry standard. Compliance with industry standards is mandatory.

The benefits of code registration

There is no obligation to register a code with the ACMA. However, registration of a code on the ACMA 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 ACMA may employ its safety net powers under sections 121 and 122 to ensure compliance. These powers enable the ACMA 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 that follows the ACMA's registration process covers all industry participants, not just those who are members of the industry body. The ACMA warnings and directions to comply with a registered code can be issued to any participant in a section of the industry, which has contravened or 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 which has developed the code. A

breach of an ACMA direction to comply may attract civil penalties. With the backing of the ACMA's powers under the law, registered codes will effectively have industry-wide coverage.

Registration of a code by the ACMA is also an acknowledgment that the code has been independently assessed by the ACMA (with input from other regulators) as meeting important regulatory criteria in the industry and consumer matters it covers. In order to be registered by the ACMA, a code must be evaluated on a series of legislatively prescribed measures. In deciding whether codes meet these requirements, the ACMA is obliged to ensure that public interest considerations are addressed without imposing undue financial and administrative burdens on participants in the industry. In doing so, the ACMA must take into consideration the number of people who are likely to benefit from the new code, and how many of those people are householders or small businesses. It must also consider the legitimate business interests of participants in the industry sector affected by the code. The ACMA's registration process ensures that registered codes provide uniform rules for conduct across the industry.

Privacy codes

In some cases, an industry code may address specific privacy concerns. Where such codes incorporate the Australian Privacy Principles under Part IIIB of the *Privacy Act 1988* (the Privacy Act), these codes are not appropriate for registration by the ACMA. Instead, the Information Commissioner may approve privacy codes, following a written application for approval to the Information Commissioner. However, the ACMA may still register codes that deal with other privacy matters such as telemarketing directories and the intrusive use of telecommunications. Codes that cover privacy matters and can be registered by the ACMA are referred to in this guide as 'Telecommunications Act privacy codes'.

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

Drafting a code

Code drafting principles

In addition to the specific requirements of sections 112 and 117 of the Telecommunications Act, there are a number of generic code drafting principles that must be followed when drafting a code. An outline of these principles is included at Appendix B. 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 Telecommunications Act requires that the ACMA 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’ (paragraph 119A(1)(d) applies in the case of code variations). These decisions must be made by the ACMA 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 ACMA that they are ‘appropriate’ include:

- > consistency with legislation
- > enforceable provisions
- > satisfactorily considered substantive issues raised during consultation
- > how the code will be administered, including implementation mechanisms, complaints-handling processes, compliance monitoring and how non-compliance is addressed.

These matters are further elaborated in the remainder of this chapter. A summary of the requirements of this chapter is contained at Appendices E and F to assist industry bodies in drafting codes to meet the requirements of section 117 (or 119A if applicable) of the Telecommunications 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
- > the section or sections of the telecommunications, telemarketing or fax marketing industry to which the code applies. This is particularly important to enable the ACMA to use its powers of direction under section 121. Under this section, the ACMA must be satisfied that a code applies to participants in the particular section of the telecommunications, telemarketing or fax marketing industry. The ACMA will only be able to register and enforce codes that clearly apply to a stated section or sections of the industry.

If a 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, telemarketing or fax marketing activities. The code must state what issues it is designed to address and what it aims to achieve.

Foreword

Although the ACMA 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 scope and objectives sections of the code. The foreword should also avoid duplication of purpose with an explanatory statement accompanying the draft code, if one is prepared. Information about the purpose and content of explanatory statements is included under the heading below, 'Developing a code for registration'.

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 B.

Code rules

A code must contain a comprehensive set of rules, which are directed at demonstrating and achieving the code's objectives. The code rules should also enable measurement of the code's 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 consider 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) (except for telemarketing and fax marketing industry codes), consumer representatives and individuals. In the case of Telecommunications Act privacy codes and codes dealing with matters related to the Australian Privacy Principles or a code approved under the Privacy Act, the Information Commissioner must be satisfied. The *Certificate of mandatory consultation on an industry code under Part 6 of the Telecommunications Act 1997* (see www.acma.gov.au/theACMA/guides-for-code-development) contains a list of matters about which industry bodies should seek specific comment from the ACCC, the TIO and the Information Commissioner.

Good drafting practice means that, where practical, each code rule should be spelled out in a separate clause.

Enforceability

Code rules should be written concisely and in plain English. Rules must be expressed in mandatory terms such as 'must' instead of 'should' or 'may'. This is required to enable the industry body and the ACMA to enforce the code. The ACMA 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, telemarketing or fax marketing industry has contravened or is contravening the code. Consequently, it is important that rules of a code, which are intended to be mandatory, are expressed in terms that create a clear obligation on the participants to comply with the requirements.

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

- > 'A supplier should ensure that its bills are delivered to customers in a timely manner' is not an enforceable rule.
- > 'A supplier must issue a bill to a customer within 10 working days after the closure of the billing period' is enforceable.

In addition to being expressed in mandatory terms, codes must also substantially relate to matters that are within the ACMA's jurisdiction under the Telecommunications Act. 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 that drafts the code, or by the individual companies that are covered by the code.

Consumer protections

To meet the requirement to provide 'appropriate community safeguards', codes that primarily address consumer protection issues must contain obligations that 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.

Delayed implementation of code provisions

Codes with provisions that commence at a date in the future can be registered by the ACMA under certain circumstances.

To register a code with delayed implementation of some provisions, the ACMA must be satisfied that the delay is necessary to avoid undue burdens on the applicable industry.

The explanatory statement to the code should explain the burdens that industry would face by commencing the provisions without a delay and how they are undue or unfair.

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 telecommunications, telemarketing or fax marketing industries described in subsections 110(2-3), 110B(2-3), and 110B(2-3), 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 ACMA will be unable to register the code. In particular, any provisions that would have the effect of asking the ACMA, 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 ACMA 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 *Competition and Consumer Act 2010* 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 D.

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 an industry covered by a code may authorise their agent to undertake 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 that attempts to remove the legal responsibility of a principal for the behaviour of its agent. They also cannot 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 that are relevant to their conduct as an agent
- > indicating that principals may wish to include clauses in their contracts with agents stipulating that the agents must comply with relevant industry codes
- > 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 include pecuniary penalties for breaches of code rules. As the imposition of a pecuniary penalty is an exercise of judicial power, the ACMA 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 ACMA.

Compliance with code rules

Code rules should also set out implementation mechanisms, which assist the industry covered by the code 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 that may be taken into account in the development of compliance programs. Compliance mechanisms enable relevant industry participants to readily establish their obligations to comply 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 *Compliance programs AS 3806-2006*, available from Standards Australia.

Referencing other documents to be complied with in a code

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. Where the code rules require compliance with 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.

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.

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, the industry body that developed the code must give consideration to updating those references in the code. Amendments to the Telecommunications Act in 2014 enable changes to an industry code to be made, with the approval of the ACMA, without having to replace the entire code. An industry body may submit draft variations of code provisions with revised references to the ACMA for approval. Copies of all referenced documents must be clearly referenced or included in an application to register or vary a code.

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 industry participants 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 relevant industry participants to comply with the referenced guidance 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 Telecommunications Act and with other legislation, such as the *Competition and Consumer Act 2010* and the *Disability Discrimination Act 1992*. They must also be consistent with relevant instruments, such as the Telecommunications Numbering Plan 2015 and the Telecommunications (Customer Service Guarantee) Standard 2011.

This is because codes are subordinate to Acts of Parliament and instruments that 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 ACMA being unable to register the code.

However, while codes are required to be both based upon, and consistent with, the Telecommunications Act and instruments made under that Act, 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 ACMA for registration must also be consistent with codes already registered by the ACMA.

Design features and performance requirements (section 115)

Section 115 of the Telecommunications 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 registered under the Telecommunications Act cannot deal with matters covered by codes registered under the *Broadcasting Services Act 1992*. Where industry bodies wish to register codes under both of these acts, the matters must be covered in separate codes.

Anti-competitive implications

There may be cases where engaging in conduct under a code places those industry participants covered at risk of breaching one or more provisions of the *Competition and Consumer Act 2010*. For some forms of conduct, an authorisation, which exempts a party from a suit under the *Competition and Consumer Act 2010*, may be granted by the ACCC if there are public benefits flowing from the conduct that 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 need for an authorisation application.

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

For further information on authorisation, see the ACCC’s information on authorisations and notifications, available at www.accc.gov.au or contact the ACCC for advice.¹

¹ www.accc.gov.au/business/applying-for-exemptions/authorisations

Code administration and compliance

Under paragraph 117(1)(d) of the Telecommunications Act, the ACMA 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 by the codes in an appropriate manner (for other codes) (119A(1)(d) of the Telecommunications Act provides the same requirements in the case of code variations). Industry-initiated code administration processes play a 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 that enable the code rules to be effectively administered by the industry body.

The ACMA'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 ACMA. They must not operate to direct or circumscribe the ACMA'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 review

The ACMA 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 a revised code should apply to any new sections of the industry that have been created, and any recommendations made by the ACMA when the code was registered. Suggested amendments should be considered promptly and resolution of the consideration referred to the submitter.

Code variations

While codes can be revised in their entirety, the Telecommunications Act now enables changes to be made to registered codes without the need to replace the whole code, as used to be the case. To vary part of an existing code, the industry body responsible for developing that code must conduct appropriate consultation before submitting the draft changes to the ACMA for approval. Consultation is required with the relevant industry participants, regulatory agencies, consumer representative body and the public, as set out in section 119A of the Telecommunications Act.

Code variations of registered codes, which differ in only minor respects from current codes, are not subject to the industry and public comment provisions of paragraphs 119A(e) and (f).

Complaints handling and independent review of decisions

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

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

Section 114 enables the TIO to consent to functions and powers under a telecommunications code. The TIO may accept complaints from consumers, and industry bodies may also establish complaint bodies to manage complaints from industry. Where complaints-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 complaints-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 further general information on complaints handling and dispute resolution, see the Australian Standard *Guidelines for complaint management in organizations AS/NZS 10002:2014*, the ACCC guide *Benchmarks for dispute avoidance and resolution—a guide* (October 1997) (available from www.accc.gov.au/publications/benchmarks-for-dispute-avoidance-resolution) and the guide *Better Practical Guide to Complaint Handling* (April 2009) (available from www.ombudsman.gov.au/pages/publications-and-media/better-practice-guides/complaint-handling.php).

Compliance monitoring mechanisms

In a co-regulatory environment, it is good practice for an industry to monitor code compliance and adherence to the code's objectives by the relevant industry participants, and to ensure that participants who are complying with the code are not being disadvantaged. Code monitoring can be undertaken by the industry body that submits the code, or through an organisation created by the code.

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.

Provisions for industry training

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

Accountability

The ACMA has continuing responsibilities under section 105 of the Telecommunications Act to monitor the adequacy of compliance with registered codes.

Codes should operate transparently and regular reporting on the effectiveness of a code assists in this process.

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

The ACMA also has powers to investigate possible code breaches under section 510 of the Telecommunications Act.

Developing a code for registration

For a code to be registered with the ACMA, it must not only meet the requirements of the Telecommunications Act and delegated legislation, but it 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.

The ACMA strongly recommends that before a code is submitted to it, a professional legislative drafter be engaged to draft the terms of the code on instructions from the industry body, or at least review and settle the final form of the code. Similarly, a professional drafter should be engaged where industry is seeking to vary an existing code, unless the details to be changed are minor, such as when the version of a document referred to by the code needs to be updated.

A professional drafter will have the skills and experience to ensure:

- > that a code is logically structured
- > that there is internal consistency in the use of terms and concepts
- > that basic checks are undertaken to ensure consistency with governing legislation and/or legislative instruments
- > that revised codes include any necessary transitional provisions
- > that other checklist matters known to professional drafters have been properly dealt with.

This should ensure that practical problems with the interpretation and application of new or revised codes are minimised.

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

The ACMA's decision-making powers under section 117 of the Telecommunications Act are subject to the provisions of section 112. This means that in exercising its powers to register a code, the Telecommunications Act obliges the ACMA to act in a manner that enables public interest considerations to be addressed without imposing undue financial and administrative burdens on participants in the telecommunications, telemarketing or fax marketing industries. This obligation is referred to in this guide as the 'public interest balance test'. Under this test, the ACMA 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 participants in the industry
- > for codes covering the telecommunications industry, the public interest, including the efficient, equitable and ecologically sustainable supply of goods and carriage 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 commencing to develop a code, industry bodies should

consider all available regulatory options, such as guidelines, specifications or voluntary codes.

In short, before an industry body commences a code, it should be satisfied that a code registered with the ACMA 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. It is advisable that industry considers consulting the ACMA when considering whether a code is the most appropriate regulatory solution.

Preparing to draft a code

Satisfying the regulatory requirements for registration of the code with the ACMA 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 that assist in assessing the extent and characteristics of the problem
- > the existing regulatory framework—identify any gaps in regulation that 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
- > who will be affected by the code.

The explanatory statement

Industry bodies can assist the ACMA 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 E.

An explanatory statement can play three important roles. The first role 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. It can also assist the ACMA in making judgements as to whether registering the code would satisfy the ACMA's decision-making obligations under the public interest balance test. An explanatory statement can also aid the ACMA in its consultation with the Office of Best Practice Regulation (OBPR). The role and requirements of the OBPR are outlined below.

While the ACMA is obliged under the Telecommunications Act to make independent assessments in relation to the public interest balance test, explanatory statements can provide important information to the ACMA 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 ACMA 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 ACMA in delivering timely decisions on code registration applications.

If a variation to a code is approved, it may also be necessary to revise the corresponding explanatory statement to match the changes made.

The Office of Best Practice Regulation

As well as applying the criteria in sections 112 and 117 of the Telecommunications Act, the ACMA must also consult with the OBPR as part of the code registration process. Part of this consultation may include the preparation of a Business Cost Calculator and/or a Regulation Impact Statement (RIS), which sets out the financial impact of the proposed code on industry and consumers. Some of the information required by the ACMA to satisfy the OBPR's criteria can be provided by industry bodies in code Explanatory Statements. For further information on the role of the OBPR and its requirements, please see the OBPR's guide *The Australian Government Guide to Regulation (2014)*² and associated supporting documents.

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. For an explanatory statement to assist the registration process, it should:

- > serve to provide a greater level of background information to the code than is provided by the code objectives
- > outline the problem or issue at hand, and the industry and consumer matters the code is designed to address
- > state why the code is required, and the policy outcomes it is expected to achieve
- > explain how the code will achieve the policy objectives, for example, by requiring particular standards to be met
- > clearly elaborate the anticipated benefits to consumers, including the numbers of consumers likely to benefit and whether they are small business or residential consumers
- > outline the benefits and costs to industry that are anticipated from the implementation of the code. It should also provide estimates of the costs to industry participants of complying with the code provisions
- > where a code contains delayed implementation clauses, carefully explain the need for the delay and the implications of immediate commencement
- > address whether there are any other public interest issues raised or addressed by the code.

² *The Australian Government Guide to Regulation (2014)*, <http://cuttingredtape.gov.au/handbook/australian-government-guide-regulation>.

Establishing the need for a code

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

Each code presented to the ACMA must be assessed on its merits against the public interest balance test at section 112. The ACMA must also be satisfied that all applicable criteria under section 117 have been met, including mandatory consultation requirements. In the case of Telecommunications Act privacy codes, the ACMA must be satisfied that additional criteria in section 117 requiring consultation with the Information Commissioner have also been met. The ACMA has no discretion to exempt a code registration application from any of the requirements of section 117. However, when applying to vary a registered code to incorporate a change of a minor nature, the criteria in paragraphs 119A(1) (e) and (f) to consult with industry and the public do not apply.

The role of industry bodies

Part 6 of the Telecommunications 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 Telecommunications Act requires that industry bodies represent the sections of the industry, which will be covered by the code they have developed. sections of the telecommunications 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;*
- (i) *electronic messaging service providers;*
- (j) *persons who install:*
 - (i) *optical fibre lines; or*
 - (ii) *facilities used, or for use, in or in connection with optical fibre lines*

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

- > public number directory publishers
- > portability service providers

- > the National Relay Service provider
- > cabling service operators.

Sections 110B and 110C of the Telecommunications Act also allow the ACMA to determine sections of the telemarketing and fax marketing industries, with the default that all persons carrying on, or proposing to carry on the activity, constitute a single section of each industry operates in the absence of any such determination.

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 ACMA.

Code content

Industry bodies are encouraged to be proactive 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, telemarketing or fax marketing 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; or*
- (g) *carrying on business as an electronic messaging service provider.*

Sections 109B and 109C, respectively, define ‘telemarketing activity’ and ‘fax marketing activity’.

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

Codes must also be consistent with the objects of the Telecommunications 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

- > appropriate safeguards for telecommunications consumers
- > responsible practices in relation to the sending of commercial electronic messages
- > responsible practices in relation to the making of telemarketing calls.

Before commencing development of a new code, industry bodies should also check the ACMA's Register of Codes (the Register) for 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 kept and maintained by the ACMA as required by section 136 of the Telecommunications Act and is available on the ACMA website:

www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telecommunications-industry-codes-and-standards.

Consultation

Industry bodies must undertake consultation during the development of the code in accordance with paragraphs 117(1)(e)–(k) of the Telecommunications Act. Part 6 places great importance on broad and thorough consultation with all interested parties. This can occur through the participation of end-user representatives 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 that 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 of this guide provide guidance to industry bodies in relation to how consultation must be conducted and considered when finalising a code for registration. The ACMA, 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. Part of this assessment will involve considering views of the TIO, ACCC, the Office of the Australian Information Commissioner (OAIC) and a consumer representative body about matters such as consistency between codes and legislation, the ability of a complaints-handling body to handle complaints under the code and, where relevant, the effect on consumers and/or the community.

The consultation requirements and the parties that must be involved for developing a code also apply before an industry representative body submits a code *variation* to the ACMA for approval. The consultation requirements when seeking to vary an existing code are set out in paragraphs 119A(e)–(k) of the Telecommunications Act.

Funding for consumer codes developed or varied with consumer representation

Telecommunications industry bodies can apply to the ACMA for reimbursement of the refundable costs they incur in developing or varying consumer-related telecommunications industry codes.

For information about the scheme and how to apply, read the ACMA's [Guide to the Reimbursement of Development Costs for Consumer-Related Telecommunications Industry Codes](#).

The key elements of the scheme are that:

- > only industry bodies and associations can apply for reimbursement
- > code development and code variation costs that may be reimbursed include those incurred through the industry body's research of the code issues, publication and consultation costs, and costs incurred in obtaining the services and involvement of

third parties (such as drafters, lawyers and consumer representatives), if such costs were incurred in developing or varying the code

- > the code or code variations must satisfy certain criteria, including that it must deal wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers
- > only telecommunications industry codes (or code variations) developed under Part 6 of the Telecommunications Act and submitted to the ACMA for registration are covered by the scheme. The costs of developing industry standards, specifications, guidelines and other supporting arrangements cannot be reimbursed under the scheme
- > some categories of costs have been excluded from the scheme and cannot be reimbursed.

Mandatory consultation with government agencies and consumer representatives

Industry bodies developing or seeking to vary *telecommunications* codes must undertake consultation on codes with the ACCC, TIO, at least one consumer representative organisation and, in the case of Telecommunications Act privacy codes under paragraph 113(3)(f), matters related to the Australian Privacy Principles or a code approved under the Privacy Act, the Information Commissioner (these organisations are referred to as ‘agencies’ below).

Industry bodies developing *telemarketing or fax marketing* codes must undertake consultation on codes with the ACCC, at least one consumer representative organisation and, in the case of Telecommunications Act privacy codes under paragraph 113(3)(f), matters related to the Australian Privacy Principles or a code approved under the Privacy Act, the Information 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, if the TIO consents. 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 that 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 need for an authorisation application.

Consultation with the Information Commissioner should also commence early in the code’s development or variation. Apart from the obligation of industry bodies to consult the Information Commissioner on Telecommunications Act privacy codes under paragraph 113(3)(j), the ACMA is also obliged to consult the Information Commissioner on codes submitted for registration, which deal with matters related to the Australian 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 Information 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. 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 public prior to 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 Telecommunications Act.

Methods of extending invitations for submission

The announcement of invitations to comment on a code (including a variation) must be made in ways that are not likely to restrict opportunities for industry and the public to comment on the draft code or code variation. Invitations to comment must be extended in a manner that is appropriate to the target audience. For example, an announcement in a trade journal or website of an invitation to submit comments could be an appropriate notice for participants in the industry, but not for the public, which would be better targeted through a medium such as the industry body or association's website, a media release, social media or 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 that 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 the industry to be members of the industry body.

Industry bodies must also aim to ensure that draft codes and code variations are published in ways that do not adversely restrict the likelihood of receiving submissions, particularly from members of the public. Draft codes and code variations must be available in the most accessible manner possible, preferably free of charge. Copies of draft codes and variations should be available on the relevant industry body's website.

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 on which 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 four working 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 (or approval for a code variation), the ACMA will not only examine whether the minimum consultation period has been satisfied for the purposes of the Telecommunications Act, but also whether the consultation period has been adequate in all of the circumstances.

In particular, the ACMA 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 whether the consultation period would be reasonable, guidance should be sought from the ACMA.

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, the industry body should undertake a second round of comment 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 change to the nature or scope of the code rules. Where an industry body is uncertain about whether changes are significant enough to require a further round of consultation, it should consult with the ACMA.

Consultation and minor changes to codes

Under section 119A, changes to registered industry codes may be achieved by varying one or more of its parts. As noted above, for code variations that differ in only minor respects from the existing code, the industry body making the change is not required to undertake formal industry and public consultation.

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 the relevant 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 change should be resubmitted for consultation.

Planning code development

Developing or varying an industry code requires careful planning. Determining code content, the drafting process, consultation within industry and with other stakeholders and the application process involves co-ordination with several parties.

Appendix F offers a framework for representative industry bodies to approach the code development process and the issues that will need to be considered. It breaks up the process into stages—from assessing the need to create or change an industry code,

setting up a mechanism to steer decision-making and code development, through to submission of the final code or variation to the ACMA for approval.

The framework should also assist industry bodies to plan the timing of their code development process, although the overall timing will vary depending on the complexity of the process and the issues covered.

Applying to register a new code or approve a code variation

Following the development of a code and the completion of consultation, industry bodies may choose to apply to the ACMA for inclusion of the code on the section 136 Register (registration). Similarly, where an industry body or bodies have completed consultation on a variation to a registered code and wish to have the change made formally, they must apply to the ACMA for approval of the variation.

This chapter provides guidance as to how industry bodies should lodge registration or approval applications with the ACMA. It also explains the kinds of evidence that should be provided with applications, so that the ACMA may be satisfied that the requirements of sections 117 (for new codes) and 119A (for code variations) have been met. Following the ACMA's administrative requirements (as contained in this guide) will assist the ACMA in making timely decisions on code registration and variation applications.

Presenting a new code to the ACMA for registration

Registration of an industry code must be initiated by the industry body that has developed the code. In order 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 an Explanatory Statement (if prepared) and supporting documentation, to the ACMA, using the form *Application form for registration of an industry code under Part 6 of the Telecommunications Act*. A copy of this form is available on the ACMA website www.acma.gov.au.

Presenting a code variation to the ACMA for approval

Starting the process for approval of a variation to one or more parts of a registered code is similar to initiating code registration. The application must be made by the industry body that has developed the code and the variations. To meet the requirements of paragraph 119A(1)(c), a code variation approval application must be signed by a person authorised by the relevant industry body proposing the variation to do so.

The application for approval commences by the industry body submitting its draft variation or variations, with an updated explanatory statement (where relevant), using the form *Application form for approval to vary a registered industry code under Part 6 of the Telecommunications Act*. A copy of this form is available on the ACMA website www.acma.gov.au.

Applications should include the following:

- > a signed code variation approval application form
- > a copy of variation or variations
- > a copy of the code with the variations included in way that clearly shows where the variations are made
- > an updated code explanatory statement (where relevant) that reflects the variations

- > all other supporting documentation noted in the remaining part of this chapter.

Providing documentation

As part of an industry body's application, documentation must also be provided to support claims in relation to all criteria in subsection 117(1) for code registration, or subsection 119A(1) for code variation of the Telecommunications Act. A checklist of the required supporting documentation is at the end of this guide. Where the application forms for registering a code or approving a code variation request supporting documentation, provision of this documentation is required by the ACMA in order for it to be satisfied that the requirements of subsection 117(1) or 119A(1) have been met. Applications that are lodged *without* the required documentation will delay the ACMA's consideration of the new code or variation. If this documentation cannot be provided, the ACMA is unable to meet the requirements of the Telecommunications Act and will not be able to register the code or approve a variation.

Representing a section of the industry

Applications for code registration or variation must clearly indicate the following:

- > the section or sections of the industry the body claims to represent and to which the code applies as defined in sections 110, 110B and 110C of the Telecommunications Act, ensuring that the code itself also clearly states 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 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
- > verification of affiliations between the body and other industry bodies that also subscribe to the code, with the combined membership forming a majority of participants in the relevant section(s)
- > 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
- > any other information that will assist the ACMA in deciding whether the industry body represents the particular section or sections of the industry.

Substantiating invitations for industry and public submissions

Prior to submission of the code or code variation to the ACMA, the industry body must have concluded all consultation required by subsections 117(1) or 119A(1). All documentation confirming that consultation has been completed should be prepared ready for submission with the code registration (or variation) application to the ACMA.

In the case of an application for code registration, the ACMA must be satisfied that a draft code or any draft variations were published, and that industry and the public were invited to submit comments. Applications for code registration or variation should include documentary evidence of:

- > an invitation to participants in each relevant section of the industry to make submissions on the draft code or variation; or
- > the participation of all members of a section of the industry in the industry body.

Documentary evidence should also be provided showing:

- > a copy of the invitation for the submission of comment on the draft code or variation 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 social media
- > the dates on which invitation to comment was issued
- > publication of the draft code or variation, including the ways in which the text was made available and any fees charged; and
- > the period of time, including dates, during which the body received submissions.

Substantiating consideration given to submissions from industry and the public

Before it can register a code or approve code variations, the ACMA must be satisfied that consideration was given by the industry body to the comments it received 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 or proposed code variations. Bodies should provide:

- > a list of submitters
- > summaries of the comments provided
- > summaries of how the comments were incorporated into the code
- > 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 Information Commissioner, using the form *Certificate of mandatory consultation on an industry code under Part 6 of the Telecommunications Act 1997* (for code registration or code variation). 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. Industry bodies should demonstrate in their registration or approval applications that they took account of the comments provided by the agencies when developing the code or code variations. This can be demonstrated either by amendment to the code in line with the comments, or by providing to the ACMA a summary of the reasons why comments were rejected for inclusion in the code.

Format of lodged application documents

The ACMA will accept all applications for code registration and code variations electronically or by mail, however electronic lodgement is preferred. If lodgement is made electronically, scanned copies of the signed application form and completed and signed certificate of mandatory consultation forms must be provided, with the original signed documents also mailed to the ACMA within three days of electronic lodgement. An electronic copy of the draft code, including any code variations, and the corresponding explanatory statement should be provided in Microsoft Word, Rich Text Format (RTF) or Portable Document Format (PDF).

The registration process

Time frames

The ACMA will endeavour to assess codes for registration and approvals to vary codes in a timely fashion. However, time frames for assessment may vary widely,

depending on the complexity of the code or variation. Assessment of less complex applications, for which all documentation is provided, should take approximately two months. Industry bodies can assist the ACMA in delivering timely decisions on code registration and variation approval applications by ensuring all documentation is provided to the ACMA in accordance with the requirements of this guide.

Confirmation of receipt

The ACMA will acknowledge in writing the receipt of each application to register an industry code or vary an existing code. Acknowledgments will include an ACMA contact officer for enquiries regarding the progress of the application. Industry bodies will also be notified where applications do not meet the ACMA's documentation or other requirements.

Outcome of the ACMA's consideration

Following consideration of a registration application, the ACMA will make a determination as to whether it is satisfied that the code meets the requirements of section 117 and whether the code will be registered. Codes, which satisfy the requirements of section 117 must be included by the ACMA in its Register of Industry Codes (as required by section 136). Industry bodies will be notified in writing of the outcome of a registration application within two working days of the ACMA's decision.

Similarly, after considering an application to vary a code, the ACMA will make a determination as to whether it is satisfied that the code variation or variations meet the requirements of section 119A and whether the variation or variations will be approved. If approved, the change will be included in the relevant code in the ACMA's Register of Industry Codes. The industry body or bodies that brought the application will be notified of the ACMA's determination within two working days of the decision being made.

Register of Industry Codes

The ACMA maintains a list of all industry codes registered with the ACMA under Part 6 as well as other information as stipulated under section 136 of the Telecommunications Act. Registered codes are available from the ACMA's website at www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-telecommunications-industry-codes-and-standards.

Code submission checklist

Before submitting a code to the ACMA for registration or variation, check that the following forms and documentation are provided with the application:

Forms and supporting documents for code registration

- > Completed and signed *Application form for registration of an industry code under Part 6 of the Telecommunications Act* attached to the front of the application to have a code registered.
- > A copy of the draft code, ensuring that an electronic copy is in Word, Rich Text Format (RTF) or Portable Document Format (PDF).
- > Explanatory statement to the code (if one is prepared).
- > An accurate reference to all documents referenced by the code, for example technical standards, voluntary standards or guidelines.
- > One completed and signed *Certificate of mandatory consultation on an industry code under Part 6 of the Telecommunications Act 1997* from **each** of the ACCC, the TIO, the Information Commissioner (where applicable), and at least one consumer representative body.
- > Supporting evidence of the industry body's claim to represent the section or sections of the industry to which the code relates.
- > Evidence of publication of the draft code, including the ways in which the draft 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.
- > 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.
- > A list of industry submitters, summaries of the comments provided and the consideration given to comments.
- > Evidence of invitations to the public to make submissions on the draft code and the methods of extending those invitations.
- > 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 Information Commissioner.

Forms and supporting documents for code variation

- > Completed and signed Application for approval to vary a registered telecommunications industry code attached to the front of the application.
- > A copy of the draft varied code that clearly shows where the variations are to be made, ensuring that an electronic copy provided is in Word, Rich Text Format (RTF) or Portable Document Format (PDF).
- > An explanatory statement to the code (where relevant), which takes account of all new code variations

- > An accurate reference to all documents referenced or affected by the code variations, for example, technical standards, voluntary standards or guidelines.
- > One completed and signed Certificate of mandatory consultation on an industry code under Part 6 of the Telecommunications Act 1997 from **each** of the ACCC, the TIO, the Information Commissioner (where applicable), and at least one consumer representative body.
- > Supporting evidence of the industry body's claim to represent the section or sections of the industry to which the code relates.
- > Evidence of publication of the draft code, including the ways in which the draft varied 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.
- > Evidence of invitations to participants in each of the relevant section or sections of the industry to make submissions on the draft varied 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.
- > A list of industry submitters, summaries of the comments provided and the consideration given to comments.
- > Evidence of invitations to the public to make submissions on the draft varied code and the methods of extending those invitations.
- > 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 Information Commissioner.

More information

For further advice on the development or registration of telecommunications industry codes under Part 6 of the Telecommunications Act, contact the ACMA:

By email: industry.codes@acma.gov.au

By phone: (03) 9963 6800 (Melbourne office)

By mail: The Manager
Consumer Interests Section
Telecommunication Safeguards Branch
Australian Communications and Media Authority
PO Box 13112
Law Courts
Melbourne, VIC 8010

Website: www.acma.gov.au

Other agencies

Australian Competition and Consumer Commission (ACCC)

By phone: (02) 6243 1111

Hotline: 1300 302 502

By mail: GPO Box 3131
Canberra, ACT 2601

Website: www.accc.gov.au

Office of the Australian Information Commissioner

By phone: 1300 363 992

By mail: GPO Box 5218
Sydney, NSW 2001

Website: www.oaic.gov.au

Telecommunications Industry Ombudsman (TIO)

By phone: 1800 062 058

Email: tio@tio.com.au

By mail: PO Box 276
Collins Street West,
Melbourne, VIC 8007

Website: www.tio.com.au

Appendix A—Extract from 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, the telemarketing industry or the fax marketing industry may develop industry codes.
- Industry codes may be registered by the ACMA.
- Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the telecommunications industry, the telemarketing industry or the fax marketing industry to comply with the code.
- The ACMA 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.

108A Electronic messaging service provider

- (1) For the purposes of this Part, if a person supplies, or proposes to supply, an electronic messaging service to the public, the person is an *electronic messaging service provider*.
- (2) For the purposes of subsection (1), a service is supplied to the public if, and only if, at least one end-user of the service is outside the immediate circle of the supplier of the service.
- (3) In this section:

electronic message has the same meaning as in the *Spam Act 2003*.

electronic messaging service means a service that enables any or all of the following electronic messages to be sent or received:

- (a) web-based email;
- (b) instant messages;
- (c) text messages;
- (d) messages of a kind specified in the regulations.

message has the same meaning as in the *Spam Act 2003*.

108B Telecommunications industry

For the purposes of this Part, the *telecommunications industry* includes an industry that involves carrying on business as an electronic messaging service provider.

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; or
- (g) carrying on business as an electronic messaging service provider.

109B Telemarketing activity

- (1) For the purposes of this Part, a *telemarketing activity* is an activity to which subsection (2), (3) or (4) applies.
- (2) This subsection applies to an activity that:
 - (a) is carried on by a person (the *first person*) under a contract or arrangement (other than a contract of employment); and
 - (b) consists of:
 - (i) using telemarketing calls to market, advertise or promote goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or
 - (ii) using telemarketing calls to advertise or promote a supplier or prospective supplier of goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or
 - (iii) using telemarketing calls to market, advertise or promote land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
 - (iv) using telemarketing calls to advertise or promote a supplier or prospective supplier of land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
 - (v) using telemarketing calls to market, advertise or promote business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities; or
 - (vi) using telemarketing calls to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities.
- (3) This subsection applies to an activity carried on by a person if the activity consists of:
 - (a) using telemarketing calls to market, advertise or promote goods or services, where the person is the supplier or prospective supplier of the goods or services; or
 - (b) using telemarketing calls to advertise or promote a supplier or prospective supplier of goods or services, where the person is the supplier or prospective supplier of the goods or services; or
 - (c) using telemarketing calls to market, advertise or promote land or interests in land, where the person is the supplier or prospective supplier of the land or interests in land; or
 - (d) using telemarketing calls to advertise or promote a supplier or prospective supplier of land or interests in land, where the person is the supplier or prospective supplier of the land or interests in land; or

- (e) using telemarketing calls to market, advertise or promote business opportunities or investment opportunities, where the person is the provider or prospective provider of the business opportunities or investment opportunities; or
 - (f) using telemarketing calls to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the person is the provider or prospective provider of the business opportunities or investment opportunities.
- (4) This subsection applies to an activity carried on by a person if the activity consists of:
- (a) using telemarketing calls to solicit donations; or
 - (b) using telemarketing calls to conduct opinion polling; or
 - (c) using telemarketing calls to carry out standard questionnaire-based research.
- (5) An expression (other than *telemarketing call*) used in this section and in section 5 of the *Do Not Call Register Act 2006* has the same meaning in this section as it has in that section.

109C Fax marketing activity

- (1) For the purposes of this Part, a *fax marketing activity* is an activity to which subsection (2), (3) or (4) applies.
- (2) This subsection applies to an activity that:
- (a) is carried on by a person (the *first person*) under a contract or arrangement (other than a contract of employment); and
 - (b) consists of:
 - (i) using marketing faxes to market, advertise or promote goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or
 - (ii) using marketing faxes to advertise or promote a supplier or prospective supplier of goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or
 - (iii) using marketing faxes to market, advertise or promote land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
 - (iv) using marketing faxes to advertise or promote a supplier or prospective supplier of land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
 - (v) using marketing faxes to market, advertise or promote business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities; or
 - (vi) using marketing faxes to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities.

- (3) This subsection applies to an activity carried on by a person if the activity consists of:
- (a) using marketing faxes to market, advertise or promote goods or services, where the person is the supplier or prospective supplier of the goods or services; or
 - (b) using marketing faxes to advertise or promote a supplier or prospective supplier of goods or services, where the person is the supplier or prospective supplier of the goods or services; or
 - (c) using marketing faxes to market, advertise or promote land or interests in land, where the person is the supplier or prospective supplier of the land or interests in land; or
 - (d) using marketing faxes to advertise or promote a supplier or prospective supplier of land or interests in land, where the person is the supplier or prospective supplier of the land or interests in land; or
 - (e) using marketing faxes to market, advertise or promote business opportunities or investment opportunities, where the person is the provider or prospective provider of the business opportunities or investment opportunities; or
 - (f) using marketing faxes to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the person is the provider or prospective provider of the business opportunities or investment opportunities.
- (4) This subsection applies to an activity carried on by a person if the activity consists of:
- (a) using marketing faxes to solicit donations; or
 - (b) using marketing faxes to conduct opinion polling; or
 - (c) using marketing faxes to carry out standard questionnaire-based research.
- (5) An expression (other than *marketing fax*) used in this section and in section 5B of the *Do Not Call Register Act 2006* has the same meaning in this section as it has in that section.

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;
 - (i) electronic messaging service providers;
 - (j) persons who install:
 - (i) optical fibre lines; or
 - (ii) facilities used, or for use, in or in connection with optical fibre lines.
- (3) The ACMA 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 a 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*.

110B Sections of the telemarketing industry

- (1) For the purposes of this Part, *sections of the telemarketing industry* are to be ascertained in accordance with this section.
- (2) If no determination is in force under subsection (3), all of the persons carrying on, or proposing to carry on, telemarketing activities constitute a single section of the telemarketing industry for the purposes of this Part.
- (3) The ACMA may, by legislative instrument, determine that persons carrying on, or proposing to carry on, one or more specified kinds of telemarketing activity constitute a section of the telemarketing industry for the purposes of this Part.
- (4) The section must be identified in the determination by a unique name and/or number.
- (5) A determination under subsection (3) has effect accordingly.
- (6) Sections of the telemarketing 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 telemarketing industry mentioned in subsection (2) or determined under subsection (3); and

(c) may be subsets of a section of the telemarketing industry mentioned in subsection (2) or determined under subsection (3).

(7) Subsection (6) does not, by implication, limit subsection (3).

110C Sections of the fax marketing industry

- (1) For the purposes of this Part, *sections of the fax marketing industry* are to be ascertained in accordance with this section.
- (2) If no determination is in force under subsection (3), all of the persons carrying on, or proposing to carry on, fax marketing activities constitute a single section of the fax marketing industry for the purposes of this Part.
- (3) The ACMA may, by legislative instrument, determine that persons carrying on, or proposing to carry on, one or more specified kinds of fax marketing activity constitute a section of the fax marketing industry for the purposes of this Part.
- (4) The section must be identified in the determination by a unique name and/or number.
- (5) A determination under subsection (3) has effect accordingly.
- (6) Sections of the fax marketing 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 fax marketing industry mentioned in subsection (2) or determined under subsection (3); and
 - (c) may be subsets of a section of the fax marketing industry mentioned in subsection (2) or determined under subsection (3).
- (7) Subsection (6) does not, by implication, limit subsection (3).

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.

111AA Participants in a section of the telemarketing industry

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

111AB Participants in a section of the fax marketing industry

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

111B Unsolicited commercial electronic messages

- (1) For the purposes of this Part, an *unsolicited commercial electronic message* is a commercial electronic message that is sent:

- (a) without the consent of the relevant electronic account-holder; or
 - (b) to a non-existent electronic address.
- (2) An expression used in this section and in the *Spam Act 2003* has the same meaning in this section as it has in that Act.

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 ACMA 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.
- (1B) The Parliament intends that bodies or associations that the ACMA is satisfied represent sections of the telemarketing industry should develop codes (*industry codes*) that are to apply to participants in the respective sections of the industry in relation to the telemarketing activities of the participants.
- (1C) The Parliament intends that bodies or associations that the ACMA is satisfied represent sections of the fax marketing industry should develop codes (*industry codes*) that are to apply to participants in the respective sections of the industry in relation to the fax marketing activities of the participants.
- (2) The Parliament intends that the ACMA, in exercising its powers under sections 117, 118, 119, 123, 124, 125, 125AA, 125A and 125B, will act in a manner that, in the opinion of the ACMA, 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, the telemarketing industry or the fax marketing 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 (other than electronic messaging service providers), the ACMA 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.
- (3A) In determining whether public interest considerations are being addressed in a way that does not impose undue financial and administrative burdens on participants in the section of the telecommunications industry that consists of electronic messaging service providers, the ACMA must have regard to:

- (a) the number of end-users who would be likely to benefit from the code or standard concerned; and
 - (b) the extent to which those end-users are residential or small business end-users; and
 - (c) the legitimate business interests of electronic messaging service providers.
- (3C) 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 telemarketing industry, the ACMA must have regard to:
- (a) the number of persons who would be likely to benefit from the code or standard concerned; and
 - (b) the extent to which those persons are householders or small business operators; and
 - (c) the legitimate business interests of participants in sections of the telemarketing industry.
- (3D) 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 fax marketing industry, the ACMA must have regard to:
- (a) the number of persons who would be likely to benefit from the code or standard concerned; and
 - (b) the extent to which those persons are householders or small business operators; and
 - (c) the legitimate business interests of participants in sections of the fax marketing industry.
- (4) Subsections (3), (3A), (3B), (3C) and (3D) do 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, the telemarketing industry or the fax marketing 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;
- (pa) the design features of:
 - (i) optical fibre lines; or
 - (ii) facilities used, or for use, in or in connection with optical fibre lines;
- (pb) performance requirements to be met by:
 - (i) optical fibre lines; or
 - (ii) facilities used, or for use, in or in connection with optical fibre lines;
- (pc) the characteristics of carriage services supplied using optical fibre lines;
- (pd) performance requirements to be met by carriage services supplied using optical fibre lines;
- (q) procedures to be followed by:
 - (i) internet service providers; and
 - (ii) electronic messaging service providers;
 in dealing with unsolicited commercial electronic messages (including procedures relating to the provision or use of regularly updated software for filtering unsolicited commercial electronic messages);
- (r) giving customers information about the availability, use and appropriate application of software for filtering unsolicited commercial electronic messages;
- (s) action to be taken to assist in the development and evaluation of software for filtering unsolicited commercial electronic messages;

- (t) action to be taken in order to minimise or prevent the sending or delivery of unsolicited commercial electronic messages, including:
 - (i) the configuration of servers so as to minimise or prevent the sending or delivery of unsolicited commercial electronic messages; and
 - (ii) the shutdown of open relay servers;
- (u) action to be taken to ensure responsible practices in relation to the use of commercial electronic messages to market, advertise or promote goods or services to individuals who are under 18 years of age;
- (v) procedures to be followed in relation to the giving of consent by relevant electronic account-holders (within the meaning of the *Spam Act 2003*) to the sending of commercial electronic messages;
- (w) record-keeping practices to be followed in relation to telemarketing calls made or attempted to be made;
- (x) action to be taken to limit the total number of telemarketing calls attempted to be made, by a particular participant in a section of the telemarketing industry, during a particular period, where the recipient answers the attempted call, but the attempted call does not have any content;
- (y) action to be taken to limit the total number of telemarketing calls made, or attempted to be made, by a particular participant in a section of the telemarketing industry, during a particular period to a particular Australian number;
- (z) record-keeping practices to be followed in relation to marketing faxes sent or attempted to be sent;
- (za) action to be taken to limit the total number of marketing faxes sent or attempted to be sent, by a particular participant in a section of the fax marketing industry, during a particular period to a particular Australian number.

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) or (t).
- (4) The rule in subsection (1) does not apply to an industry code made for the purposes of Division 2AA of Part V of the *Copyright Act 1968*.
- (5) 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 to have the effect (whether direct or indirect) of requiring:
- (a) optical fibre lines; or
 - (b) facilities used, or for use, in or in connection with optical fibre lines;
- to:
- (c) have particular design features; or
 - (d) meet particular performance requirements.

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 a registered APP code (as defined in that Act).

Division 4—Industry codes

117 Registration of industry codes

- (1) This section applies if:
 - (a) the ACMA is satisfied that a body or association represents a particular section of the telecommunications industry, the telemarketing industry or the fax marketing 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, telemarketing activities or fax marketing activities, as the case may be, of those participants; and
 - (c) the body or association gives a copy of the code to the ACMA; and
 - (d) the ACMA 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 ACMA is satisfied that, before giving the copy of the code to the ACMA:
 - (i) the body or association published a draft of the code on its website, 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
 - (iii) the body or association complied with the section 119B publication requirements in relation to any submissions that were received from participants in that section of the industry within that period; and
 - (f) the ACMA is satisfied that, before giving the copy of the code to the ACMA:
 - (i) the body or association published a draft of the code on its website, 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
 - (iii) the body or association complied with the section 119B publication requirements in relation to any submissions that were received from members of the public within that period; and
 - (g) the ACMA is satisfied that the ACCC has been consulted about the development of the code; and
 - (h) except in a case where:

- (i) the code applies to participants in a section of the telemarketing industry and deals with one or more matters relating to the telemarketing activities of those participants; or
 - (ii) the code applies to participants in a section of the fax marketing industry and deals with one or more matters relating to the fax marketing activities of those participants;
- the ACMA is satisfied that the Telecommunications Industry Ombudsman has been consulted about the development of the code; and
- (i) the ACMA 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 ACMA is satisfied that the Information 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 ACMA; and
 - (k) the ACMA has consulted the Information 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 Australian Privacy Principles; or
 - (ii) other provisions of the *Privacy Act 1988* that relate to those principles; or
 - (iii) a registered APP code (as defined in that Act) that binds a participant in that section of the telecommunications industry, the telemarketing industry or the fax marketing industry; or
 - (iv) provisions of that Act that relate to the registered APP code
- (2) The ACMA 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 ACMA may request codes

- (1) If the ACMA is satisfied that a body or association represents a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry, the ACMA 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, telemarketing activities or fax marketing activities, as the case may be, of those participants; and

- (b) give the ACMA a copy of the code within the period specified in the notice.

Note: The ACMA may request the body or association to develop the industry code to replace an earlier industry code that the Information Commissioner (exercising functions under the *Privacy Act 1988*) has advised the ACMA is inconsistent with the Australian Privacy Principles or a relevant registered APP 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 ACMA must not make a request under subsection (1) in relation to a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry unless the ACMA 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 ACMA 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 ACMA is satisfied that the benefits to the community from the operation of the code would outweigh the costs of compliance with the code.

- (4AA) The rule in subsection (4) does not apply to a code to the extent (if any) to which compliance with the code is likely to have the effect (whether direct or indirect) of requiring:
 - (a) optical fibre lines; or
 - (b) facilities used, or for use, in or in connection with optical fibre lines;to:
 - (c) have particular design features; or
 - (d) meet particular performance requirements.
- (4A) The ACMA must consult the Information 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 Australian Privacy Principles; or
 - (b) other provisions of the *Privacy Act 1988* relating to those principles; or
 - (c) a registered APP code (as defined in that Act) that binds one or more participants in the section of the telecommunications industry,

the telemarketing industry or the fax marketing industry to which the request relates; or

- (d) provisions of that Act that relate to the registered APP code.
- (5) The ACMA 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, the telemarketing industry or the fax marketing industry

- (1) If the ACMA is satisfied that a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry is not represented by a body or association, the ACMA 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 ACMA 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, telemarketing activities or fax marketing activities, as the case may be, 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.

119A Variation of industry codes

Scope

- (1) This section applies if:
 - (a) an industry code is registered under this Part; and
 - (b) the code:
 - (i) applies to participants in a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry; and
 - (ii) deals with one or more matters relating to the telecommunications activities, telemarketing activities or fax marketing activities, as the case may be, of those participants; and
 - (c) the body or association that developed the code gives a draft variation of the code to the ACMA; and
 - (d) disregarding any provisions of the code that are not affected (whether directly or indirectly) by the variation, the ACMA is satisfied that:

- (i) in a case where the code (as proposed to be varied) deals with matters of substantial relevance to the community—the code (as proposed to be varied) provides appropriate community safeguards for the matters covered by the code (as proposed to be varied); or
 - (ii) in a case where the code (as proposed to be varied) does not deal with matters of substantial relevance to the community—the code (as proposed to be varied) deals with the matters covered by the code (as proposed to be varied) in an appropriate manner; and
- (e) except in a case where the draft variation is of a minor nature—the ACMA is satisfied that, before giving the copy of the draft variation to the ACMA:
- (i) the body or association published the draft variation on its website and invited participants in that section of the industry to make submissions to the body or association about the draft variation 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
 - (iii) the body or association complied with the section 119B publication requirements in relation to any submissions that were received from participants in that section of the industry within that period; and
- (f) except in a case where the draft variation is of a minor nature—the ACMA is satisfied that, before giving the copy of the draft variation to the ACMA:
- (i) the body or association published the draft variation on its website and invited members of the public to make submissions to the body or association about the draft variation 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
 - (iii) the body or association complied with the section 119B publication requirements in relation to any submissions that were received from members of the public within that period; and
- (g) the ACMA is satisfied that the ACCC has been consulted about the development of the draft variation; and
- (h) except in a case where:
- (i) the code (as proposed to be varied) applies to participants in a section of the telemarketing industry and deals with one or more matters relating to the telemarketing activities of those participants; or
 - (ii) the code (as proposed to be varied) applies to participants in a section of the fax marketing industry and deals with one or more matters relating to the fax marketing activities of those participants;

the ACMA is satisfied that the Telecommunications Industry Ombudsman has been consulted about the development of the draft variation; and

- (i) the ACMA is satisfied that at least one body or association that represents the interests of consumers has been consulted about the development of the draft variation; and
- (j) in a case where the draft variation deals with a matter set out in paragraph 113(3)(f)—the ACMA is satisfied that the Information Commissioner has been consulted by the body or association about the development of the draft variation before the body or association gave the copy of the draft variation to the ACMA; and
- (k) the ACMA has consulted the Information Commissioner about the draft variation and consequently believes that he or she is satisfied with the draft variation, if the draft variation deals directly or indirectly with a matter dealt with by:
 - (i) the Australian Privacy Principles; 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, the telemarketing industry or the fax marketing industry; or
 - (iv) provisions of that Act that relate to the approved privacy code.

Approval of variation

- (2) The ACMA must, by written notice given to the body or association, approve the draft variation.
- (3) If the ACMA approves the draft variation, the code is varied accordingly.

Period for making submissions

- (4) A period specified under subparagraph (1)(e)(i) or (1)(f)(i) must run for at least 30 days.

119B Publication requirements for submissions

- (1) This section sets out the publication requirements that apply to submissions that:
 - (a) are about a particular draft; and
 - (b) were received by a body or association as mentioned in:
 - (i) subparagraph 117(1)(e)(iii); or
 - (ii) subparagraph 117(1)(f)(iii); or
 - (iii) subparagraph 119A(1)(e)(iii); or
 - (iv) subparagraph 119A(1)(f)(iii).

Publication of submissions

- (2) The body or association must publish those submissions on its website.
- (3) Subsection (2) has effect subject to subsections (4) and (6).

Confidential or commercially sensitive material

- (4) If:
 - (a) a submission made by a person consists wholly or partly of material that is claimed by the person to be confidential or commercially sensitive; and

- (b) the person has requested the body or association not to publish the material; and
- (c) the body or association is satisfied that the material is confidential or commercially sensitive;

then:

- (d) if the submission consists wholly of the material—the body or association is not required to publish the submission on its website; or
- (e) if:
 - (i) the submission consists partly of the material; and
 - (ii) it is practicable for the body or association to remove the material from the submission;the body or association may remove the material from the submission before publishing the submission on its website; or
- (f) if:
 - (i) the submission consists partly of the material; and
 - (ii) it is not practicable for the body or association to remove the material from the submission;the body or association is not required to publish the submission on its website.

- (5) If, under subsection (4), the body or association removes material from a submission before publishing the submission on its website, the body or association must publish on its website a statement to the effect that confidential or commercially sensitive material in the submission has not been published.

Defamatory material

- (6) If the body or association considers that a submission consists wholly or partly of material that is, or is likely to be, defamatory:
- (a) if the submission consists wholly of the material—the body or association is not required to publish the submission on its website; or
 - (b) if:
 - (i) the submission consists partly of the material; and
 - (ii) it is practicable for the body or association to remove the material from the submission;the body or association may remove the material from the submission before publishing the submission on its website; or
 - (c) if:
 - (i) the submission consists partly of the material; and
 - (ii) it is not practicable for the body or association to remove the material from the submission;the body or association is not required to publish the submission on its website.
- (7) If, under subsection (6), the body or association removes material from a submission before publishing the submission on its website, the body or association must publish on its website a statement to the effect that material in the submission has not been published on the grounds that the material is, or is likely to be, defamatory.

Statistical statement

- (8) The body or association must publish on its website a statement that sets out:
- (a) the total number of those submissions; and
 - (b) if a number of those submissions have not been published, or have been published in a modified form, because of subsection (4) or (6)—that number.

120 Replacement of industry codes

Changes to an industry code may be achieved by replacing the code instead of varying the code. However, this does not prevent the ACMA 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.

121 Directions about compliance with industry codes

- (1) If:
- (a) a person is a participant in a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry; and
 - (b) the ACMA 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 ACMA may, by written notice given to the person, direct the person to comply with the industry code.
- (1A) If the ACMA is satisfied that the contravention of the industry code relates directly or indirectly to a matter dealt with by the Australian Privacy Principles or by a registered APP code (within the meaning of the *Privacy Act 1988*), the ACMA must consult the Information Commissioner before giving the direction.
- (1B) If:
- (a) at a time when an industry code (the *original code*) was registered under this Part, a direction could have been given to a person under subsection (1) in respect of the original code; and
 - (b) the original code has been replaced by another code that is registered under this Part; and
 - (c) the person could have been given a direction under subsection (1) in respect of the replacement code, if the conduct concerned had occurred after the replacement code was registered;
- then, during the period when the replacement code is registered under this Part, the person may be given a direction under subsection (1) in respect of the replacement code.
- (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.
- (5) A direction under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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, the telemarketing industry or the fax marketing industry.
- (2) The ACMA may issue a formal warning if the person contravenes an industry code registered under this Part.
- (3) If the ACMA is satisfied that the contravention of the industry code relates directly or indirectly to a matter dealt with by the Australian Privacy Principles or by a registered APP code (within the meaning of the *Privacy Act 1988*), the ACMA must consult the Information Commissioner before issuing the warning.
- (4) If:
 - (a) at a time when an industry code (the ***original code***) was registered under this Part, a formal warning could have been given to a person under subsection (2) in respect of the original code; and
 - (b) the original code has been replaced by another code that is registered under this Part; and
 - (c) the person could have been given a formal warning under subsection (2) in respect of the replacement code, if the conduct concerned had occurred after the replacement code was registered;then, during the period when the replacement code is registered under this Part, the person may be given a formal warning under subsection (2) in respect of the replacement code.

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

- (1) The ACMA 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 ACMA 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 ACMA may determine an industry standard if a request for an industry code is not complied with

- (1) This section applies if:
 - (a) the ACMA 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, the telemarketing industry or the fax marketing industry; and
 - (ii) deal with one or more matters relating to the telecommunications activities, telemarketing activities or fax marketing activities, as the case may be, 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 ACMA subsequently refuses to register the code; and
 - (c) the ACMA is satisfied that it is necessary or convenient for the ACMA 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 ACMA may, by legislative 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 ACMA must consult the body or association to whom the request mentioned in paragraph (1)(a) was made.

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

- (1) This section applies if:
 - (a) the ACMA is satisfied that a particular section of the telecommunications industry, the telemarketing industry or the fax marketing industry is not represented by a body or association; and
 - (b) the ACMA 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 ACMA 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, telemarketing activities or fax marketing activities, as the case may be, 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 ACMA is satisfied that it is necessary or convenient for the ACMA 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 ACMA may, by legislative 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*.

125 ACMA 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, the telemarketing industry or the fax marketing industry; and
 - (ii) deals with one or more matters relating to the telecommunications activities, telemarketing activities or fax marketing activities, as the case may be, of those participants; has been registered under this Part for at least 180 days; and
 - (b) the ACMA is satisfied that the code is deficient (as defined by subsection (7)); and
 - (c) the ACMA 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 ACMA is satisfied that it is necessary or convenient for the ACMA 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 ACMA may, by legislative 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 ACMA is satisfied that a body or association represents that section of the industry, the ACMA must consult the body or association before determining an industry standard under subsection (3).
- (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, the telemarketing industry or the fax marketing industry and deals with one or more matters relating to the telecommunications activities, telemarketing activities or fax marketing activities, as the case may be, 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.

125AA ACMA must determine an industry standard if directed by the Minister

- (1) The ACMA may, by legislative instrument, determine a standard that:
- (a) applies to participants in a particular section of the telecommunications industry; and
 - (b) deals with one or more matters relating to the telecommunications activities of those participants.

Note 1: For examples of matters that may be dealt with by industry standards, see section 113.

Note 2: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) A standard under subsection (1) is to be known as an *industry standard*.
- (3) If the ACMA is satisfied that a body or association represents that section of the telecommunications industry, the ACMA must consult the body or association before determining a standard under subsection (1).
- (4) The Minister may, in writing, direct the ACMA to:
- (a) determine a standard under subsection (1) that:
 - (i) applies to participants in a specified section of the telecommunications industry; and
 - (ii) deals with one or more specified matters relating to the telecommunications activities of those participants; and
 - (b) do so within a specified period.
- (5) The ACMA must not determine a standard under subsection (1) unless it does so in accordance with a direction under subsection (4).

125A ACMA must determine certain industry standards relating to the telemarketing industry

- (1) Before the commencement of Part 2 of the *Do Not Call Register Act 2006*, the ACMA must, by legislative instrument, determine a standard that:
- (a) applies to participants in each section of the telemarketing industry; and
 - (b) deals with the following matters relating to the telemarketing activities of those participants:

- (i) restricting the hours and/or days during which telemarketing calls may be made or attempted to be made;
 - (ii) requiring that a telemarketing call must contain specified information about the relevant participant;
 - (iii) requiring that, if a person other than the relevant participant caused a telemarketing call to be made, the call must contain specified information about the person who caused the call to be made;
 - (iv) requiring the relevant participant to terminate a telemarketing call if a specified event happens;
 - (v) requiring the relevant participant to ensure that calling line identification is enabled in respect of the making of a telemarketing call; and
- (c) is expressed to commence at the same time as the commencement of Part 2 of the *Do Not Call Register Act 2006*.
- (2) A standard under subsection (1) is to be known as an ***industry standard***.
- (3) If the ACMA is satisfied that a body or association represents a section of the telemarketing industry, the ACMA must consult the body or association before determining a standard under subsection (1).
- (4) The ACMA must ensure that a standard is in force under subsection (1) at all times after the commencement of Part 2 of the *Do Not Call Register Act 2006*.

125B ACMA must determine certain industry standards relating to the fax marketing industry

- (1) The ACMA may, by legislative instrument, determine a standard that:
- (a) applies to participants in each section of the fax marketing industry; and
 - (b) deals with the following matters relating to the fax marketing activities of those participants:
 - (i) restricting the hours and/or days during which marketing faxes may be sent, or attempted to be sent, to an Australian number;
 - (ii) requiring that a marketing fax sent to an Australian number must contain specified information about the person who authorised the sending of the fax;
 - (iii) restricting the total number of marketing faxes sent, or attempted to be sent, by the relevant participant during a particular period to a particular Australian number;
 - (iv) requiring that, if a marketing fax sent to an Australian number is authorised by a particular person (the ***authorising person***), the fax must contain information about how the recipient of the fax may send a message to the effect that the recipient does not want to receive any marketing faxes authorised by the authorising person.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) A standard under subsection (1) is to be known as an ***industry standard***.

- (3) If the ACMA is satisfied that a body or association represents a section of the fax marketing industry, the ACMA must consult the body or association before determining a standard under subsection (1).
- (4) The ACMA must ensure that a standard is in force under subsection (1) at all times after the commencement of this section.
- (5) For the purposes of this section, *authorise*, when used in relation to a marketing fax, has the same meaning as in the *Do Not Call Register Act 2006*.

126 Industry standards not to be determined for certain privacy matters

The ACMA 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 ACMA is satisfied that the benefits to the community from the operation of the standard would outweigh the costs of compliance with the standard.

128 Compliance with industry standards

- (1) If an industry standard that applies to participants in a particular section of the telecommunications industry, the telemarketing industry or the fax marketing 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, the telemarketing industry or the fax marketing industry.
- (2) The ACMA may issue a formal warning if the person contravenes an industry standard registered under this Part.

130 Variation of industry standards

The ACMA may, by legislative instrument, vary an industry standard that applies to participants in a particular section of the telecommunications industry, the telemarketing industry or the fax marketing 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, telemarketing activities or fax marketing activities, as the case may be, of those participants; and
- (b) otherwise regulate adequately those participants in relation to one or more matters relating to the telecommunications activities, telemarketing activities or fax marketing activities, as the case may be, of those participants.

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

131 Revocation of industry standards

- (1) The ACMA may, by legislative 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.

132 Public consultation on industry standards

- (1) Before determining or varying an industry standard, the ACMA must:
 - (a) cause to be published in a newspaper circulating in each State a notice:
 - (i) stating that the ACMA 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 ACMA 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 ACMA 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 ACMA must consult the ACCC.

(1A) Before determining or varying an industry standard (other than an industry standard under section 125A or 125B), the ACMA must consult the Telecommunications Industry Ombudsman.

(2) Before revoking an industry standard under subsection 131(1), the ACMA must consult the ACCC and the Telecommunications Industry Ombudsman.

134 Consultation with Information 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 Australian Privacy Principles; or
- (b) other provisions of the *Privacy Act 1988* relating to those principles; or
- (c) a registered APP code (as defined in that Act); or
- (d) provisions of that Act that relate to a registered APP code.

(2) Before determining or varying the industry standard, the ACMA must consult the Information Commissioner.

(3) Before revoking the industry standard under subsection 131(1), the ACMA must consult the Information Commissioner.

135 Consultation with consumer body

(1) Before determining or varying an industry standard, the ACMA 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 ACMA must consult at least one body or association that represents the interests of consumers.

135A Consultation with the States and Territories

Before determining or varying an industry standard under section 125A or 125B, the ACMA must consult:

- (a) each State; and
- (b) the Australian Capital Territory; and
- (c) the Northern Territory.

Division 6—Register of industry codes and industry standards

136 ACMA to maintain Register of industry codes and industry standards

- (1) The ACMA is to maintain a Register in which the ACMA includes:
 - (a) all industry codes required to be registered under this Part, as those codes are in force from time to time; 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 ACMA 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 60 of the *Australian Communications and Media Authority Act 2005*:
 - (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 ACMA 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 ACMA may provide the relevant information:
 - (a) on a data processing device; or
 - (b) by way of electronic transmission.

Division 6A—Reimbursement of costs of development or variation of consumer-related industry codes

136A Application for eligibility for reimbursement of costs of development or variation of consumer-related industry code

- (1) If a body or association proposes to develop or vary an industry code that:
 - (a) applies to participants in a particular section of the telecommunications industry; and
 - (b) deals with one or more matters relating to the telecommunications activities of those participants; and
 - (c) deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers;

the body or association may apply to the ACMA for a declaration that the body or association is eligible for reimbursement of refundable costs incurred by it in developing the code or varying the code, as the case may be.

Note: For *refundable cost*, see section 136E.

Form of application etc.

- (2) An application must be:
 - (a) in writing; and
 - (b) in accordance with the form approved in writing by the ACMA; and
 - (c) accompanied by:
 - (i) an estimate of the total of the refundable costs likely to be incurred by the body or association in developing the code or varying the code, as the case may be; and
 - (ii) a statement breaking down that estimate into categories of refundable costs.

Further information

- (3) The ACMA may, within 20 business days after an application is made, request the applicant to give the ACMA, within the period specified in the request, further information about the application.
- (4) The ACMA may refuse to consider the application until the applicant gives the ACMA the information.

Definition

- (5) In this section:

business day means a day on which the ACMA is open for business in the Australian Capital Territory and in Victoria.

136B Declaration of eligibility for reimbursement of costs of development or variation of consumer-related industry code

Development of code

- (1) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the development of a code, the ACMA must make the declaration if it is satisfied that:
 - (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code will deal wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (c) the process for developing the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the development of the code; and
 - (d) the total of the refundable costs likely to be incurred by the body or association in developing the code, as set out in the estimate that accompanied the application, is reasonable.
- (2) If the ACMA is not satisfied as to the matters set out in subsection (1), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

Variation of code

- (2A) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the variation of a code, the ACMA must make the declaration if it is satisfied that:
 - (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code is registered under this Part; and
 - (c) the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the process for varying the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the variation of the code; and
 - (e) the total of the refundable costs likely to be incurred by the body or association in varying the code, as set out in the estimate that accompanied the application, is reasonable.
- (2B) If the ACMA is not satisfied as to the matters set out in subsection (2A), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

General provisions

- (3) A declaration under this section is irrevocable, and remains in force for 2 years.

- (4) A declaration under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

136C Reimbursement of costs of developing or varying consumer-related industry code

Reimbursement of costs—development of code

- (1) If:
- (a) a section 136B declaration was made in relation to the development of an industry code by a body or association; and
 - (b) when the section 136B declaration was in force, the body or association gave a copy of the code to the ACMA under section 117; and
 - (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the ACMA is satisfied that the process for the development of the code ensured that the interests of those retail customers were adequately represented in relation to the development of the code; and
 - (e) the copy of the code was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in developing the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the development of the code; and
 - (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in developing the code; and
 - (ii) was incurred when the section 136B declaration was in force;the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.
- Note: For *refundable cost*, see section 136E.
- (2) The specified amount must be equal to whichever is the lesser of the following:
- (a) the total of the costs itemised in the subparagraph (1)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (1) of its entitlement to be paid that amount.

Reimbursement of costs—variation of code

- (3A) If:
- (a) a section 136B declaration was made in relation to the variation of an industry code by a body or association; and
 - (b) when the section 136B declaration was in force, the body or association gave a copy of the variation to the ACMA under section 119A; and
 - (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the ACMA is satisfied that the process for the variation of the code ensured that the interests of those retail customers were adequately represented in relation to the variation of the code; and
 - (e) the copy of the variation was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in varying the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the variation of the code; and
 - (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in varying the code; and
 - (ii) was incurred when the section 136B declaration was in force;
- the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.

Note: For *refundable cost*, see section 136E.

- (3B) The specified amount must be equal to whichever is the lesser of the following:
- (a) the total of the costs itemised in the subparagraph (3A)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3C) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (3A) of its entitlement to be paid that amount.

Appropriation

- (4) The Consolidated Revenue Fund is appropriated for payments under this section.

Approved auditors and approved auditing requirements

- (5) The ACMA may make a written determination specifying:

- (a) the persons who are to be *approved auditors* for the purposes of this section; and
- (b) the requirements that are to be *approved auditing requirements* for the purposes of this section.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (6) A determination under subsection (5) has effect accordingly.
- (7) A determination under subsection (5) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

136D Costs—transactions between persons not at arm’s length

If:

- (a) a body or association has incurred a cost in connection with a transaction where the parties to the transaction are not dealing with each other at arm’s length in relation to the transaction; and
- (b) apart from this section, the cost is counted for the purposes of the application of this Division to the body or association; and
- (c) the amount of the cost is greater than is reasonable;

the amount of the cost is taken, for the purposes of the application of this Division in relation to the body or association, to be the amount that would have been reasonable if the parties were dealing with each other at arm’s length.

136E Refundable cost

- (1) For the purposes of this Division, a *refundable cost* incurred by a body or association in developing or varying a code is a cost incurred by the body or association in developing the code or varying the code, as the case may be, other than a cost specified in a written determination made by the ACMA under this subsection.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) A determination under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

135A Consultation with the States and Territories

Before determining or varying an industry standard under section 125A or 125B, the ACMA must consult:

- (a) each State; and
- (b) the Australian Capital Territory; and
- (c) the Northern Territory.

Division 6—Register of industry codes and industry standards

136 ACMA to maintain Register of industry codes and industry standards

- (1) The ACMA is to maintain a Register in which the ACMA includes:
 - (a) all industry codes required to be registered under this Part, as those codes are in force from time to time; 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 ACMA 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 60 of the *Australian Communications and Media Authority Act 2005*:
 - (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 ACMA 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 ACMA may provide the relevant information:
 - (a) on a data processing device; or
 - (b) by way of electronic transmission.

Division 6A—Reimbursement of costs of development or variation of consumer-related industry codes

136A Application for eligibility for reimbursement of costs of development or variation of consumer-related industry code

- (1) If a body or association proposes to develop or vary an industry code that:
 - (a) applies to participants in a particular section of the telecommunications industry; and
 - (b) deals with one or more matters relating to the telecommunications activities of those participants; and
 - (c) deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers;

the body or association may apply to the ACMA for a declaration that the body or association is eligible for reimbursement of refundable costs incurred by it in developing the code or varying the code, as the case may be.

Note: For *refundable cost*, see section 136E.

Form of application etc.

- (2) An application must be:
 - (a) in writing; and
 - (b) in accordance with the form approved in writing by the ACMA; and
 - (c) accompanied by:
 - (i) an estimate of the total of the refundable costs likely to be incurred by the body or association in developing the code or varying the code, as the case may be; and
 - (ii) a statement breaking down that estimate into categories of refundable costs.

Further information

- (3) The ACMA may, within 20 business days after an application is made, request the applicant to give the ACMA, within the period specified in the request, further information about the application.
- (4) The ACMA may refuse to consider the application until the applicant gives the ACMA the information.

Definition

- (5) In this section:

business day means a day on which the ACMA is open for business in the Australian Capital Territory and in Victoria.

136B Declaration of eligibility for reimbursement of costs of development or variation of consumer-related industry code

Development of code

- (1) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the development of a code, the ACMA must make the declaration if it is satisfied that:
 - (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code will deal wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (c) the process for developing the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the development of the code; and
 - (d) the total of the refundable costs likely to be incurred by the body or association in developing the code, as set out in the estimate that accompanied the application, is reasonable.
- (2) If the ACMA is not satisfied as to the matters set out in subsection (1), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

Variation of code

- (2A) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the variation of a code, the ACMA must make the declaration if it is satisfied that:
 - (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code is registered under this Part; and
 - (c) the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the process for varying the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the variation of the code; and
 - (e) the total of the refundable costs likely to be incurred by the body or association in varying the code, as set out in the estimate that accompanied the application, is reasonable.
- (2B) If the ACMA is not satisfied as to the matters set out in subsection (2A), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

General provisions

- (3) A declaration under this section is irrevocable, and remains in force for 2 years.

- (4) A declaration under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

136C Reimbursement of costs of developing or varying consumer-related industry code

Reimbursement of costs—development of code

- (1) If:
- (a) a section 136B declaration was made in relation to the development of an industry code by a body or association; and
 - (b) when the section 136B declaration was in force, the body or association gave a copy of the code to the ACMA under section 117; and
 - (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the ACMA is satisfied that the process for the development of the code ensured that the interests of those retail customers were adequately represented in relation to the development of the code; and
 - (e) the copy of the code was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in developing the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the development of the code; and
 - (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in developing the code; and
 - (ii) was incurred when the section 136B declaration was in force;the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.
- Note: For *refundable cost*, see section 136E.
- (2) The specified amount must be equal to whichever is the lesser of the following:
- (a) the total of the costs itemised in the subparagraph (1)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (1) of its entitlement to be paid that amount.

Reimbursement of costs—variation of code

- (3A) If:
- (a) a section 136B declaration was made in relation to the variation of an industry code by a body or association; and
 - (b) when the section 136B declaration was in force, the body or association gave a copy of the variation to the ACMA under section 119A; and
 - (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the ACMA is satisfied that the process for the variation of the code ensured that the interests of those retail customers were adequately represented in relation to the variation of the code; and
 - (e) the copy of the variation was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in varying the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the variation of the code; and
 - (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in varying the code; and
 - (ii) was incurred when the section 136B declaration was in force;
- the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.

Note: For *refundable cost*, see section 136E.

- (3B) The specified amount must be equal to whichever is the lesser of the following:
- (a) the total of the costs itemised in the subparagraph (3A)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3C) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (3A) of its entitlement to be paid that amount.

Appropriation

- (4) The Consolidated Revenue Fund is appropriated for payments under this section.

Approved auditors and approved auditing requirements

- (5) The ACMA may make a written determination specifying:

- (a) the persons who are to be *approved auditors* for the purposes of this section; and
- (b) the requirements that are to be *approved auditing requirements* for the purposes of this section.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (6) A determination under subsection (5) has effect accordingly.
- (7) A determination under subsection (5) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

136D Costs—transactions between persons not at arm’s length

If:

- (a) a body or association has incurred a cost in connection with a transaction where the parties to the transaction are not dealing with each other at arm’s length in relation to the transaction; and
- (b) apart from this section, the cost is counted for the purposes of the application of this Division to the body or association; and
- (c) the amount of the cost is greater than is reasonable;

the amount of the cost is taken, for the purposes of the application of this Division in relation to the body or association, to be the amount that would have been reasonable if the parties were dealing with each other at arm’s length.

136E Refundable cost

- (1) For the purposes of this Division, a *refundable cost* incurred by a body or association in developing or varying a code is a cost incurred by the body or association in developing the code or varying the code, as the case may be, other than a cost specified in a written determination made by the ACMA under this subsection.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) A determination under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Appendix B—Code drafting principles

Because registered codes are a form of regulation under the Telecommunications Act, 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 ACMA for registration.

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.
- > Make sure that the code has a logical 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.
- > 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
 - > for use 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
 - > spelling and punctuation.

Appendix C—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
- > whether the code deals with one or more matters relating to telecommunications, fax marketing or telemarketing activities
- > the section or sections of the telecommunications, telemarketing or fax marketing industry to which the code applies.

Content

- > consistent with the objects of the Telecommunications Act
- > consistent with the provisions of the Telecommunications Act and with other legislation
- > consistent with codes already registered with the ACMA
- > 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'
- > substantially relates to matters that are within the ACMA's jurisdiction
- > 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, such as compliance standards or guidelines, these clauses are appropriately drafted
- > 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 complaints-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 on the section 136 Register.

Appendix D—Bilateral clauses

1. Where bilaterals are required under statute (e.g. *Competition and Consumer Act 2010*)

- 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 Parties to this Code recognise that two or more individual participants will, as provided for under the *Competition and Consumer Act 2010*[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 *Competition and Consumer Act 2010* [or *other relevant statute*].
- Clause x.3 Parties to this Code recognise that such bilateral agreements should include, but are not limited to, the following matter:...

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 Parties to this Code recognise 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 Parties to this Code recognise that such bilateral agreements should include, but are not limited to, the following matters:...

Appendix E—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 ACMA 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 Best Practice Regulation (OBPR).

In particular, the explanatory statement should contain sufficient information on which the ACMA will be able to base a Business Cost Calculator (BCC) or Regulation Impact Statement (RIS). For further information on the requirements of a BCC or RIS please refer to the OBPR's *The Australian Government Guide to Regulation (2014)* <http://cuttingredtape.gov.au/handbook/australian-government-guide-regulation>.

The ACMA 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

Appendix F—Framework for planning code development

This guide suggests a pathway to help efficiently manage the co-regulatory processes of code review, development or variation, including the handling of contentious issues or situations that may arise during these processes. The guide is for industry codes submitted under Part 6 of the *Telecommunications Act 1997*.

	Task/Activity	Stakeholders	Commentary/Description
1.	Decision to review, create or vary a code	Relevant industry body	<p>Notify the ACMA of decision to Review</p> <p>If it is a decision to create a code or revise ahead of schedule there will be other stakeholders, including the ACMA, involved at this stage or earlier.</p> <p>Alternatively, the ACMA may request a representative industry body to develop a Code.</p>
2.	Initial discussion with the ACMA following decision to review, create or vary a code	Relevant industry body and the ACMA	<p>Industry body shares first-cut of their project plan regarding code development and jointly identify:</p> <ul style="list-style-type: none"> - Anticipated timeline - Objectives, scale of review and substantive issues - Key stakeholders and known sensitivities (including any known perspectives of the ACMA) - Planned structure (e.g. an industry steering committee, composition, Chair etc.) - Channels for stakeholder input - Stakeholder engagement and public communications strategies - Whether the ACMA should be an observer on the industry steering committee and at what level - Whether pre-public comment consultation is desirable - Whether a Regulation Impact Statement (RIS) is likely to be necessary - Relevant industry body management and ACMA management leads

			<ul style="list-style-type: none"> - Timing/milestones for ongoing discussion with the ACMA - Whether the costs of code development could be eligible for reimbursement <p>Agree any changes to the plan and amend accordingly</p>
3.	Create appropriate structure to develop or vary a code	Relevant industry body and involved stakeholders	<ul style="list-style-type: none"> - Create planning structure (e.g. set up industry steering committee) and establish terms of reference (ToR) for project - Appoint Chair and (if agreed), appoint ACMA observer representative - Initiate stakeholder engagement and public communications activities
4.	Code drafting	All identified	<p>Representative industry body is responsible for preparing a draft Code</p> <p>Stakeholder inputs to be considered during drafting</p>
5.	Pre-public comment stakeholder liaison	Relevant industry body, ACMA and other key stakeholders	<p>Industry body drafting the code approves the public consultation version of the draft code.</p> <p>Pre-public consultation (PPC) with ACMA (if agreed desirable) and seek to agree targeted maximum duration of PPC</p> <p>Industry body briefs key stakeholders, as required</p> <p>Preparation of Privacy Impact Assessment, if required</p>
6.	Public comment	CA & Public	Mandatory public consultation period of at least 30 days
7.	Consideration of public submissions		<p>Industry body considers public comments received and, where appropriate, revises draft Code</p> <p>Industry body briefs ACMA on changes made and any contentious issues, then considers feedback from the ACMA</p>
8.	Response to public comments	Relevant industry body and respondents	Industry body responds to individuals and organisation who provided submissions during public consultation period

9.	Certificates of mandatory consultation	Relevant industry body	Industry body obtains certificates of mandatory consultation from the ACCC, TIO, OAIC and ACCAN (or other appropriate consumer representative body) that the required consultation under Part 6 of the Telecommunications Act has occurred.
10.	Pre-submission check	Industry body and the ACMA	Final discussion to check whether any issues remain that require further action and/or impinge on decision to submit code for registration (or variation). In the case of an industry code that deals with issues that relate to the Australian Privacy Principles, then the industry body should also check with the OAIC that the Privacy Commissioner is satisfied with the way the code addresses those issues.
11.	Submit code	Industry body and the ACMA	Industry body gives final approval of the Code and submits it to the ACMA for consideration for registration (or variation) Industry body finalises claim for code reimbursement (where relevant) Industry body issues public communications as appropriate
12.	RIS	Industry body and the ACMA	Industry body coordinates industry input to the ACMA to prepare RIS (if required) ACMA to submit RIS to the Office of Best Practice Regulation (OBPR) consideration and liaise with the industry body on any OBPR advice or comments that need to be addressed in a resubmitted RIS
13.	ACMA decision	ACMA and others	Ideally the project plan should target a timeframe for a decision, while recognising that many variable may impact on this. The timeframe also need to take account of the frequency and scheduling of Authority meetings. However, ACMA assessment of less complex code registration or variation applications should take approximately two months.