



G U I D E L I N E

DEVELOPMENT OF TELECOMMUNICATIONS INDUSTRY OPERATIONS CODES

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Australian Communications Authority (ACA)

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Guidelines for the Development of Self-Regulatory Telecommunications Industry Operations Codes of Practice

This Guideline comprises of six parts:

- A An **overview** of the framework within which telecommunications industry operations codes of practice are to be developed. This overview includes aims and objectives for the Guidelines.
 - B A set of **guiding principles** which are intended to serve as reference points for all industry operations codes development activities
 - C **Operational principles** relating to specific aspects of industry operations codes development activities
 - D A **template** for industry operations codes
 - E A checklist for determining **priorities** for industry operations codes development activities
- Att I **Part 6 of the *Telecommunications Act 1997*** which deals with Industry Codes and Industry Standards.

The Explanatory Memorandum to the *Telecommunications Act 1997* may be available through the Department of Communications and the Arts' web site at www.dca.gov.au

- Att II **Divisions 1 and 2 of Part XIB of the *Trade Practices Act 1974*** which deal with anti-competitive conduct in telecommunications markets. In preparing these Guidelines regard has also been had to Part IV and **Part VII of the *Trade Practices Act 1974*** which refer to restrictive trade practices and authorisations by the **Australian Competition and Consumer Commission.**

Participants

The ACIF Working Committee that developed this Guideline consisted of the following companies and representatives:

Representative	Company
Cate Farley (<i>Chairperson</i>)	Optus
Peter Gilmartin	Australian Communications Authority
Sarah Bridge	Consumers' Telecommunications Network
Sabinus Robi	Primus

This Guideline was issued in 1997 in draft form for comment as ACIF DR 9705.

INTRODUCTION

The new telecommunications legislation accords significant priority to industry self-regulation and provides for important delegation to the industry and relevant stakeholders of the development of industry codes of practice. As well as a major focus on consumer codes, the new legislation envisages a self-regulatory regime for industry operations codes as well as for access codes within the Australian Communications Access Forum (ACAF).

In view of the particular requirements and regulatory treatment of industry operations codes from both a telecommunications and trade practices perspective, the Operations Codes Reference Panel has prepared this set of principles and guidelines as a framework from which the telecommunications industry can develop industry operations codes. These principles and guidelines will work in tandem with but need to be distinguished from those guidelines and the work being undertaken by the Australian Communications Industry Forum's Consumer Codes Reference Panel (CCRP) and other reference panels established within the Australian Communications Industry Forum (ACIF) and the Australian Communications Access Forum (ACAF) which are moving forward in the development of consumer codes and access codes respectively.

PART A - Overview

A.1 Definition

At the outset it is important to define what is meant by an industry operations code as distinct from a consumer or access code.

The new telecommunications legislation specifically outlines the areas in which industry codes may be developed. Many of these, such as 'privacy' or 'telling customers about goods and services on offer' relate specifically to the services delivered to consumers and the rights of consumers when purchasing those services. The Government has also indicated that while many codes will be of interest to consumers, codes may relate to many other matters¹ in accordance with the Government's overall regulatory policy of light-handed industry regulation. The industry itself acknowledges that certain operations codes will be required within the deregulated telecommunications context to facilitate efficient, pro-competitive practices. The subject matter of such codes could include, for example, preselection and barring. While some of these codes are likely to include provisions which provide protections for consumers, their emphasis will be to regulate activities among industry participants themselves.

Where industry operations codes do include consumer protections, there may need to be a process of public education for the complaint mechanisms to be coordinated with complaint mechanisms already established under consumer codes and the Telecommunications Industry Ombudsman (TIO) scheme so as to avoid unnecessary duplication and consumer confusion. Accordingly, the activities of industry bodies making industry operations codes will need to be coordinated with ACIF's Consumer Codes Reference Panel (CCRP). The TIO will need to be consulted.

The ACAF is established in accordance with Part XIC of the Trade Practices Act and is given specific statutory functions and responsibilities.

The ACAF recommends to the Australian Competition and Consumer Commission (ACCC) access services which should become declared services. The ACAF has developed an access code setting out standard terms and conditions and other matters relating to access, including the terms and conditions on which access providers should meet the Standard Access Obligations. The access code may deal with technical and operations issues concerning the provision of access to declared services.

Industry operations codes do not have to be confined to declared services but there is obviously potential for overlap between industry operations codes and the access code developed by ACAF. As Part XIC establishes the more specific regime and as the access code is formally issued by the ACCC, industry operations codes should recognise and be consistent with the terms and conditions of the access code.

At the same time, there should be consultation and coordination between bodies making industry operations codes and the ACAF to avoid unnecessary duplication and inconsistency. It is also anticipated that the ACCC in approving access undertakings and in arbitrating access disputes may have regard to industry operations codes, where relevant, on the basis that these codes represent industry views about how such operational issues should be addressed.

Industry operations codes can be defined as:

"codes which deal with operations practices within the telecommunications industry with a view to achieving efficient, pro-competitive outcomes for industry participants and relevant protections for end users".

¹ Explanatory memorandum to the *Telecommunications Act 1997*, Part 6

Operations matters covered by codes could include interworking of operator 'back office' systems, such as inter-operator billing, procedures for customer service ordering, change of customer details, associated end user safeguards network arrangements and technical interworking matters not addressed by the ACAF code or related implementation issues. The industry recognises that there is a need for flexibility in the development and subject matter of operations codes to allow for changing industry circumstances or the potential scope of a particular code. It is also important to note the intention of the *Telecommunications Act 1997* in relation to self regulation which is that public interest considerations be addressed in a way that does not impose undue financial and administrative burdens on participants in the telecommunications industry.

A.2 Background and Aims

This document has been prepared by a Working Committee under the Operations Codes Reference Panel of the Australian Communications Industry Forum Limited (ACIF) as a framework for the development of industry operations codes. The structure, framework and many of the guidelines and principles are based on work already carried out by the CCRP. However, they have been adapted to meet with the particular requirements of industry operations codes.

The aims and objectives of this Guidelines framework proposed by the Operations Codes Reference Panel are:

- (i) to provide industry with a framework for the development and operation of industry operations codes;
- (ii) to provide industry with appropriate guiding principles aimed at ensuring non-discriminatory and competitively neutral outcomes for industry operations codes; and
- (iii) to provide industry with a mechanism to develop efficient and cost effective practices which benefit both industry and end users.

This document also provides a template to which it is expected that operations codes development Working Committees will have regard.

It is intended that this document will form the basis of a consultation process with industry, government, regulators and end users to ensure that the perspectives of all stakeholders are reconciled as part of the process of developing industry operations codes.

A.3 Key regulatory driver

As industry operations codes have their own particular requirements as compared with consumer codes or technical standards, it is important to highlight the key regulatory focus which will underpin operations codes development and implementation.

As industry operations codes deal with procedures between industry participants which may influence competition between them and with other industry participants, the codes may face scrutiny from both the ACCC as well as the ACA (responsible for formal registration of codes) and some situations may require formal authorisation by the ACCC. Accordingly, competition considerations will be a major factor in developing industry operations codes, including the rights to participate in the making and administration of the code, entitlements of non-code participants who utilise code procedures, impartiality of complaint handling procedures and the nature of sanctions for non-compliance.

A.4 Legislative Framework - Telecommunications Act 1997

The Second Reading Speech to the Telecommunications Act 1997 sets out the Government's objectives in implementing a predominantly self-regulatory framework for the telecommunications industry. In particular, it details arrangements for the establishment of a codes of practice regime designed to provide a framework for industry self-regulation by means of industry-developed codes which are to be registered with the Australian Communications Authority (the ACA, which comprises of the merged former AUSTEL and the Spectrum Management Authority).

This regime takes account of the possibility that in some areas industry consensus might not be achievable, and thus safeguard provisions have been developed to enable the regulator to step in and formally request codes to be made by industry or to establish standards. The clear signal is, however, that the industry is encouraged and expected to progress and resolve issues wherever possible in the absence of intervention.

The Government has stated that codes and standards should reflect the legitimate needs and interests of all industry stakeholders, if they are to work properly and that consultation must occur with the industry, the public and the TIO and, where privacy issues arise, the Privacy Commissioner, in the development of registered codes and the making of standards.

The proposed arrangements are based on bodies or associations that the ACA is satisfied represent sections of the telecommunications industry developing codes and registering them with the ACA. The ACA has also been provided with safety net powers which are able to be used if self-regulation in an industry 'section' has serious failings.

Industry codes will allow both existing matters, and any new matters that emerge in the post 1997 environment, to be dealt with by an appropriate level of regulation. Other matters will continue to be regulated under statute or in carrier licence conditions or service provider rules, for example: emergency calls, TIO participation and directory services. If other matters of a high level of importance arise the Minister may declare licence conditions or the ACA may determine service provider rules.

Below is an outline of Part 6 of the Telecommunications Act 1997, which deals with industry codes and industry standards:

- Bodies and associations that the ACA is satisfied represent sections of the telecommunications industry may develop industry codes.
- Industry codes may be registered by the ACA.
- The ACCC, the TIO and at least one body or association which represents the interests of consumers must be consulted about the development of a code.
- Compliance with an industry code is voluntary unless the ACA directs a particular participant in the telecommunications industry to comply with the code.
- The ACA has a reserve power to make an industry standard if there is no representative industry body in place to develop a code, where industry fails to comply with an ACA request for a code to be developed, or where it is assessed that a code is inadequate or it fails.
- Compliance with industry standards is mandatory. (Note: Industry standards provide a formal back-up to industry self-regulation by way of codes. It is intended that industry standards not be made unless industry self-regulation using codes fails.)

Further detail on the legislative provisions relating to industry self-regulation may be found in Attachment I to this document, which provides extracts from the Telecommunications Act 1997.

A.5 Legislative Framework - The Trade Practices Act 1974

Even though industry operations codes may be registered by the ACA (and the ACCC therefore consulted), the potential application of the general competition provisions of the *Trade Practices Act* also needs to be addressed.

The proposed telecommunications industry operations codes may potentially breach Part IV of the *Trade Practices Act* because they may constitute:

- an exclusionary contract, arrangement or understanding between two or more competitors which involve or give rise to a boycott of some other persons or class of persons; or
- a contract, arrangement or understanding with the purpose or which has or is likely to have the effect, of substantially lessening competition.

Aspects of an industry operations code and its operation which might breach the *Trade Practices Act* include:

- obligations which require industry participants to conduct or not conduct their businesses in certain ways, with the object of ensuring ethical conduct. There can be a fine line between code requirements which promote fair competition and those which protect incumbent participants from the competitive challenge of 'unorthodox' market conduct of new entrants;
- restrictions or qualifications on membership of the code, which may have the effect of denying particular groups of industry participants or individual participants the competitive advantages to be gained from participation in a code; and
- imposing sanctions for non-compliance. The collective 'punishment' of one industry participant by its competitors can raise competitive concerns, particularly with more severe sanctions such as expulsion or a 'refusal to deal' punishment which can have the effect of severely damaging that participant's business.

Section 88 of the *Trade Practices Act* permits the ACCC to authorise conduct which may breach the Act where the ACCC considers that conduct is nonetheless in the public interest.

The test for ACCC authorisation of a *proposed contract arrangement or understanding* which may breach Part IV of the *Trade Practices Act* in the absence of authorisation is as follows:

"Whether that provision or conduct will either result, or be likely to result, in a benefit to the public which outweighs any detriment caused by any lessening of competition likely to result if the provision or proposed conduct comes into operation." (Section 90(6))

Public benefit has been held to broadly constitute 'anything of value to the community generally, any contribution to the aims pursued by society'. Once public benefit has been assessed, any detriment caused by any lessening of competition must be weighed up against this public benefit. Any benefit to the public and any lessening of competition which would or would be likely to result from any proposed conduct or provision can only be made in the overall context of the particular industry in which the applicant operates, the function performed by the applicant prior to authorisation and the market affected by the proposed conduct or provision.

The following have been held to be examples of public benefit particularly in relation to Section 45 matters:

- the encouragement and preservation of small businesses;
- the promotion of industrial harmony;
- the generation of new trade and stimulation of consumer spending;
- increase in efficiency;
- permitting large scale investment which would otherwise not occur;
- facilitating the efficient operation of a market;
- the creation of efficient markets;
- promoting product quality;
- introducing smooth and efficient operation and technical procedures;
- permitting full utilisation of capacity;
- reducing negotiating imbalance by permitting collective negotiations.

Establishing the requisite degree of public benefit very much depends upon the facts of each case. Industry operations codes will need to carefully evaluate their 'public benefit' elements which may not be as obvious as that of consumer codes. It will be particularly important to ensure that industry operations codes do not unfairly advantage one group of participants over another or benefit current participants in the market and serve as a barrier to entry for future participants.

A.6 The Operations Codes Reference under the Australian Communications Industry Forum (ACIF)

The Australian Communications Industry Forum (ACIF) will undertake a major part of the management of the self-regulatory activities of the communications industry post 1 July 1997, including providing a framework within which technical standards, consumer codes of practice and industry operations codes will be developed. It is intended that the ACIF will be representative of all sections of the industry, on both the supply and demand sides, and will serve as a major interface between the industry and the regulatory agencies, the Government, the Australian Communications Access Forum (ACAF) and the Telecommunications Industry Ombudsman (TIO).

The ACIF structure, its procedures and processes will be developed and refined as a matter of priority within the industry, in order to meet the tight time frames within which industry self-regulatory mechanisms need to be established.

The ACIF structure provides for Reference Panels and Working Committees to develop standards and codes of practice. It is envisaged that these Guidelines, as developed by the Operations Codes Reference Panel and the Consumer Codes Reference Panel and made available for public comment, will form the framework for the ongoing work on industry operations codes within the ACIF structure.

The ACIF has also requested accreditation by the Standards Accreditation Board to develop standards for the telecommunications industry. Standards which have already been developed by Standards Australia may also serve as a useful starting point for the development of industry operations codes where the industry considers that a telecommunications specific code is required.

A.7 Activities of the Operations Codes Reference Panel

The Operations Codes Reference Panel has comprised to date certain representatives of the organisations listed below. It has also had regard to ACCC documentation and to ACCC involvement in other forums.

- Australian Communications Authority (ACA) (merged AUSTEL/SMA post 1 July 1997)

Note: The abbreviation 'ACA' in these documents refers to the Australian Communications Authority

- Australian Competition and Consumer Commission
- Australian Information Industry Association
- Australian Telecommunications Users Group
- Consumers Telecommunication Network
- Optus
- Primus
- Société Internationale de Télécommunications Aéronautiques
- Service Providers Industry Association
- Spectrum
- Standards Australia
- Telstra
- Vodafone

A.8 Proposed consultation on this document

In order to ensure that as wide a range of industry and end user participants as possible have the opportunity to review and comment on the output of this Draft Code, this set of guidelines is being broadly disseminated, and comments and feedback are invited from interested parties.

Comments are requested by the Australian Communications Industry Forum (ACIF). Written comments are to be sent to ACIF.

Further information on the work of the Operations Codes Reference Panel may be obtained from ACIF.

A.9 Ongoing Activities of the Operations Codes Reference Panel (OCRP)

The comments received on this document will be important in ensuring that the Guidelines and approach to industry operations code development are soundly based.

The Operations Codes Reference Panel will continue to give attention to prioritising work plans, operations procedures and the structures to support code development work. The intention is to ensure that momentum is maintained in this critical area of industry self regulation.

PART B - Guiding principles

These principles are intended to apply uniformly to all industry operations codes development activities and to be the reference points against which to test such activities. They are viewed as fundamental to the development of industry operations codes.

B.1 Industry and End User Benefit

- Operations codes should be developed to promote efficient and cost-effective interworking between industry participants.
- Operations codes should be directed at maximising industry and end user benefit, having regard to public interest, and, where appropriate, community safeguard considerations to promote ethical, competitive and fair trading practices..
- In considering industry and end user benefit, regard is to be had to the need to avoid undue administrative and financial burdens to the industry.

B.2 Competitive Neutrality and Non-Discrimination

- Operations codes should be competitively neutral, neither unfairly favouring one industry participant or group of industry participants over other industry participants or favouring current industry participants over potential future new entrants. Operations codes should seek to promote a more vigorously and openly competitive market.
- Code development should ensure that the requirements of any operations codes, and its complaint procedures, are not misused by any industry participant to gain competitive advantage over another and that any operations codes does not unduly impede vigorous competition in the telecommunications industry.
- Operations codes should facilitate competition and not obstruct or impede it. The ability of industry participants to differentiate themselves in the market based on their services or facilities is important to competition, and operations codes should not impose unnecessary standards and procedures which reduce the scope for competitive conduct.

B.3 Inclusiveness

- Operations codes need to be developed on the basis of a cooperative and inclusive approach. While the development of operations codes primarily will be of interest to, and the responsibility of, industry participants, matters dealt with by operations codes can impact end users and in some circumstances, may establish procedures which are accessed and used by end users. Accordingly, end users should be consulted in the development of operations codes. The form and extent of consultation will reflect the extent and impact of a code on end users.
- A high level of commitment by industry participants is best achieved by maximising the opportunities for involvement by industry participants in code development.
- Input should be sought from employees of companies involved in code implementation and from user groups. Employee consultation is necessary in order to achieve a sense of ownership/responsibility by those expected to adhere to the codes. This is an internal management issue for companies to resolve based on their own specific requirements.
- Mechanisms set up to develop and administer codes should contain appropriate industry, end user and regulatory representation. These mechanisms should also provide for regulatory bodies to play an advisory, consultative or representational role, as appropriate.

B.4 Responsiveness

- Operations codes should address industry issues, having regard to end user concerns and stakeholder priorities, and should respond to the changing requirements of a dynamic industry. Code development activities should also recognise the priorities of regulatory agencies and bodies such as the ACA, the ACCC, the ACAF and the ACIF.
- Codes, where possible, should be based on concrete data on the nature of the issue, for example complaint statistics held by members of the industry and government agencies. However, it is also recognised that, consistent with the development of a more competitive, multi-operator environment, there may be occasions where code development activities will be focused on international developments or be pro-active in facilitating the development of new industry operations practices to avoid any anticipated operations problems in industry.
- Codes should reflect the actual operation of business/transactional processes between industry participants and end users. That is, codes must be implementable.
- Technological change is particularly rapid in the telecommunications industry. Technological advances may enable operations matters covered by operations codes to be implemented in a more efficient and effective manner. Operations codes should not be a barrier to the introduction of new technology but should actively facilitate its introduction to enhance the competitiveness and economic efficiency of the industry. Accordingly, operations codes should establish a mechanism for monitoring technological developments relevant to operations practices and procedures established by that code and for the code to be varied to incorporate new technology where that would enhance the efficiency of those operations practices and procedures.
- However, it is also important to acknowledge that industry participants may address and implement technological change in different ways and at a different pace, depending upon their service portfolio, their market position and their resources. While the overall efficiency of the industry should be the primary consideration, the different capabilities of and impact on individual industry participants should be considered when changing operations practices and procedures.
- The development, operation and enforcement of operations codes should be transparent to all stakeholders.

B.5 Flexibility

- Operations codes should set minimum acceptable practices (including, where feasible, measurable requirements) which do not unnecessarily limit industry's ability to improve on the minimum level.
- Operations codes also should not constrain two or more individual industry participants agreeing to different arrangements provided that those arrangements meet the minimum acceptable practices of the operations codes and that those arrangements do not impact on the ability of other industry participants to interwork with parties to those arrangements in accordance with the minimum acceptable practices. Any such bilateral arrangements also will need to comply with the *Trade Practices Act*, including the anti-competitive conduct and competition notices provision of Part XIB.
- Operations codes should be practical and flexible and able to be readily adjusted to meet changing industry conditions, end user expectations and regulatory requirements.
- Formal review mechanisms should be built into all operations codes including the provision for prompt amendment of a code (if required) after any review.

B.6 Accountability/Commitment

- Industry members should be encouraged to become code participants.
- Industry participants to an operations code should clearly and publicly indicate their commitment and the means by which they will be held accountable to a code.
- All operations codes should have built in accountability mechanisms to the industry and in relation to provisions impacting on end users. The ACIF will provide accountability mechanisms which can be utilised in relation to an individual operations code.
- Industry needs to be committed to the development of a particular code and committed to achieving an outcome, otherwise codes will not work.

B.7 Coverage And Enforceability

- Operations codes should clearly set out the extent of coverage or scope, their operation and the means of enforceability in the event of a breach.
- Operations codes should promote to the industry the benefits of compliance.
- Operations codes should encompass pro-active, educative and constructive sanctions on industry participants relevant to the particular operations code.
- Operations codes will be consistent with and implement efficiently any underlying access and interconnection arrangements applying between industry participants, the requirements of any access code and any standards formulated by the ACAE.
- Equitable and competitively neutral procedures should be put in place for the resolution of complaints under an operations code. Industry complaints will be handled in an impartial and non-discriminatory way with independent appeal mechanisms included. Consumer complaints under an operations code will be dealt with by the Telecommunications Industry Ombudsman (TIO). The ACIF will establish independent, arms-length complaint handling and enforcement procedures which can be utilised by an individual operations code.

B.8 Consistency

- Codes should embody common structures and basic propositions, i.e. there should be no surprises in codes. Codes should have common definitions and be consistent with government policy and relevant regulatory and legislative instruments.
- While subject matters of consumer codes and operations codes differ significantly, it will be administratively efficient and less confusing to industry participants and to consumers to utilise, to the extent practicable, similar structures and processes between these different groups of codes. The ACIF structure will assist in achieving consistency in the development, operation, administration and enforcement of different types of codes. However, each code should be appropriate to its own requirements, and it is anticipated that some of the provisions and processes of operations codes could be quite different from consumer codes.

B.9 Clarity

- In terms of clarity of the wording of code provisions, code rules should be clear and concise and address specific issues.
- In terms of clarity of industry self regulation, codes should have clear objectives, with well-defined roles and responsibilities for all participants so that they give guidance and certainty to all those involved in dealings under the code.

PART C - Operations principles

C.1 Initiation of a code

- (i) Initiation of codes should rest with industry and stakeholders, operating through, for example, the ACIF structure.
- (ii) Priorities for code development should be determined in accordance with an agreed framework (refer Part E).
- (iii) Consistent with the intent of the post 1997 legislation (refer Attachment I for details), the ACA should intervene when -
 - a request by the ACA for an industry code to be developed by a body or association representing a particular section of the telecommunications industry is not complied with;
 - the ACA refuses to register a code;
 - no industry body or association is formed; or
 - the industry code fails².

C.2 Input to code scoping and development

- (i) The scoping process to develop a code should be undertaken by or under the auspices of the Operations Codes Reference Panel and should be a process inclusive of all potential stakeholders. The Operations Codes Reference Panel will be responsible for identifying and notifying potential stakeholders. The Operations Code Reference Panel will ensure that end users and other stakeholders are given the opportunity during this scoping phase to consider whether the code is likely to impact on them and therefore whether they should be represented on the working committee developing the code.

² ACA staff have provided the following guidance as to the likely approach the ACA might take in relation to consumer code compliance which may be useful for establishing the ACA's role in operations codes compliance:

It is expected that the ACA approach would be one of practical administration, i.e. in considering compliance at industry, individual participant or individual non-participant level, assessment of the issue should be in terms of whether there is significant detriment or potential detriment to the consumer protection intended by the registered code.

Consistent with this approach, if an issue is raised that a participant in a registered relevant code is contravening that code, the remedy should lie with the industry in its willingness to apply the appropriate sanctions included in the code. The Ministerial Council of Consumer Affairs (MCCA) guidelines for the preparation of Fair Trading Codes of Conduct industry codes stress the necessity for any code to be effective and accordingly the necessity for it to incorporate sanctions. If in practice the sanctions are not applied or are not effective, the ACA would have the ability to apply a number of options, including the following:

- it could advise the relevant code body that given its failure to enforce the code, the ACA is satisfied that the code is deficient. It would give a notice requiring the deficiencies to be addressed within a given time. If not rectified to its satisfaction, there would then be grounds to bring into play the provisions of Section 125 of the *Telecommunications Act 1997* whereby the ACA could develop a mandatory standard; or
- should the ACA conclude that the nature of the contravention warranted such action, it could use the powers of Section 122 to issue a formal warning to the party or it could direct its compliance with the code under Section 121.

Should the industry party acting inconsistently with the provisions of the registered relevant code not formally subscribe to that code, the legislation enables the ACA to also issue a formal warning or directions to comply on the basis that such a party is a participant in the particular section of the telecommunications industry covered by the code. The ACA would have regard to the nature and frequency of such contrary acts as are available through such sources as its own records, the records of the TIO, of the code body and of other relevant bodies.

As to the situation where there is a concern as to compliance with the code at a more general level, the ACA would consider the case on its merits having regard to the provisions of Section 125(7) to determine whether the code should be regarded as deficient. The mechanisms for doing so and the options to address the issue would be as outlined in the previous paragraph. In considering an issue of this importance, the ACA would consult widely with interested parties prior to reaching a conclusion.

- (ii) There should be participation in code development, by industry, regulators and end users in accordance with C.2(i) followed by public consultation in accordance with the preceding guidelines.
- (iii) Industry and stakeholder commitment is required before the ACA is approached to register a code.
- (iv) Where an industry operations code deals with issues of particular concern to consumers this part of the proposed code may be referred to the Consumer Codes Reference Panel for its input or, where appropriate, referred to the relevant Reference Panel on other specific issues.
- (v) Early assessment should be made of the likelihood of requiring authorisation by the ACCC for an operations code (in addition to consulting the ACCC in the registration process pursuant to s.117 (1)(g) of the *Telecommunications Act 1997*). If so, the code should be submitted to the ACCC as early as possible. Ideally, this assessment could be done at the 'concept stage' of a code where the ACCC could be consulted for an informal opinion.

C.3 Characteristics of codes

- (i) Codes should be accessible and clear to all readers.
- (ii) Codes should be written in plain concise language so that the code can be readily understood and applied by its users and be made widely available free of charge and in a suitable format to end users.
- (iii) Operations codes may need to incorporate technical descriptions or specifications. These should be set out in sufficient detail to enable an industry participant to develop necessary systems, practices and procedures within its own organisation in a cost effective and efficient manner. Where it is not practical to include technical details or specifications, the relevant documentation should be clearly referenced in the operations code and places where that documentation can be obtained should be identified. It is intended that the ACIF will take responsibility for the collection and dissemination of this sort of information.
- (iv) Existing national and international experiences in the development and promulgation of codes and standards should be considered where appropriate and relevant.
- (v) In line with Ministerial Council of Consumer Affairs (MCCA) guide on Fair Trading Codes of Conduct, each code should contain sections on -
 - scope - who it applies to and who is bound by the code;
 - objectives - the specific industry activities to which the code refers and the expected outcomes;
 - code rules - technical standards, data formatting and transmission requirements (where relevant) and minimum acceptable standards to be delivered by members of the industry;
 - complaints, dispute procedures and sanctions, enforcement processes, appeal processes;
 - administration of the code;
 - publicity and reporting;
 - monitoring, review and amendments; and
 - definitions.

- (vi) Codes should set out rights and obligations of all parties to the code and opportunities for redress where necessary.

C.4 Code Registration, Administration, Compliance and Enforcement

Each code should be registered with the ACA. As noted above, before registration of the code is sought from the ACA, it should be determined whether authorisation of the code by the ACCC is required, having regard to pre-authorisation considerations (noted in the ACCC paper, *The role of the ACCC in the development of consumer codes for the telecommunications industry*).

The following principles should be followed in relation to the administration and enforcement of the operations code:

- (i) Compliance with a code is in the first instance subject to industry self-regulation.
- (ii) Codes should be administered by a broadly representative entity which reflects an industry focus and where appropriate end user representation and with the opportunity for regulatory consultation if required. ACIF will provide a consultation and administration framework for operations codes which are brought under the umbrella of ACIFA Reference Panel or a Working Committee will be established for operations codes or for a group of related operations codes. These may in turn establish ad hoc Working Groups. Other relevant Reference Panels or Working Committees within the ACIF structure may also be consulted in the development and administration of an operations code depending on the subject matter of that operations code.
- (iii) Consistent with Section 121 of the *Telecommunications Act 1997*, the ACA may direct a party which is contravening a code to comply with that code, and any person so directed must comply with that direction³.
- (iv) Codes should be monitored on an ongoing basis and reviewed regularly, including ongoing monitoring of performance against codes and regular, accessible reporting of results to stakeholders.
- (v) Codes should include procedures for making necessary amendments based on monitoring and review outcomes.
- (vi) Enforcement should be efficient, effective, timely, fair and independent.

³ The Explanatory Memorandum explains that "It is intended that compliance with industry codes be voluntary or as determined by the industry section subject to the code. It is envisaged, however, that where a code is effective and being complied with by a majority of participants to whom it applies, it may be appropriate to direct non-compliant persons to comply with the code. This may particularly apply when the person can give no good reason for non-compliance with the code. In this context, Section 121 allows the ACA to direct the person to comply with a code. This provides a back-up to self-regulation by allowing a person who refuses to comply with otherwise successful self-regulatory arrangements to be directed to comply with a code; in effect, compliance with the code becomes mandatory for that person."

PART D - Template for codes of practice

Below are extracts from the ACCC and MCCA guides to the development and implementation of fair trading codes of conduct, with additions and amendments relevant to industry self-regulation of operations matters within the telecommunications industry. The ACCC recommends that codes of practice should have the structure outlined.

In developing telecommunications-specific industry operations codes, the requirements appropriate to the particular code under development, should be chosen, in order to ensure compliance with ACCC baseline requirements.

Section 1 INTRODUCTION

- (i) Background
- (ii) Scope

who it applies to and who is bound by the code

- (iii) Objectives

the specific industry activities to which the code refers and the expected outcomes

- (iv) Definitions

explaining technical words or abbreviations used

Section 2 CODE RULES

Code rules can cover standards and practices and/or minimum acceptable standards and practices to be delivered by members of the industry, setting standards and practices for such matters as are relevant to the code under development, including, for example:

- information sharing procedures;
- documentation requirements, relating to operations matters including requirements to exchange documents with another provider, to produce documents as verification and to retain and store documents;
- communication between industry participants;
- information disclosure;
- specific information for end users;
- complaint handling;
- means of resolving disputes; and
- education of members and employees in the principles and procedures of the code to ensure that they are aware of it and practise it in their day-to-day dealings.

Listed below are some particular subject areas for operations codes. All of these require that there be agreed practices between carriage service providers. Such practices may also have subsequent impact on end users.

- Change of carriage service provider.
- Fault reporting.
- Unwelcome calls.
- Barring.
- Billing.
- Integrated public number database (IPND).
- Preselection.
- Emergency services.

However, it is important to note that this list is not exhaustive and that the Guidelines for the development of industry operations codes will need a certain degree of flexibility to deal with other issues as they arise.

Section 3 ADMINISTRATION

(i) Complaint handling

Provision for the resolution of complaints is important for the success of any code scheme. Complaint handling under industry operations codes is likely to be managed by separate processes with consumer complaints under an industry operations code being referred to the Telecommunications Industry Ombudsman (TIO) and industry complaints under an industry operations code to be dealt with by an ACIF established, independent, arms-length complaints scheme. Other general complaints from consumers are also likely to be dealt with by the ACIF (subject to final arrangements to be settled by the ACIF).

The TIO Scheme, was established to provide free, independent, just, informal and speedy resolution of consumer complaints and disputes regarding telecommunications services. Operating as an office of last resort for customers who have first given their telephone company a reasonable opportunity to resolve their complaints, it is independent of government, carriers, service providers and other interested bodies, and accessible to residential and small business consumers of telecommunications services who remain dissatisfied after lodging a complaint with their telephone company.

This Scheme will continue under the new legislative regime and will be expanded to compulsorily cover carriage service providers supplying standard telephone services and Internet service providers. Moreover, the TIO may also accept powers and functions under codes. Even though industry operations codes deal primarily with matters between industry participants, some code procedures may be used by end users or impact on consumers, e.g. churn processes. As such, end users and consumers could be given certain rights to make complaints under industry operation codes. It is in the interests of both consumers and industry to have consumer complaints under consumer or industry operations codes dealt with by the same process. The complaint handling procedures for an operations code and the sanctions or penalties which may be imposed on the industry participant for breach of a consumer safeguard in an operations code should broadly mirror the TIO's existing powers and processes.

The ACCC is likely to pay close attention to complaint handling processes in any application for authorisation of an operations code.

The investigation and resolution of complaints between industry participants can give rise to concerns about the competitive implications of those processes. Industry participants must have confidence that the complaint investigation and enforcement processes of an industry operations code are fair, objective and transparent. This is unlikely to be achieved where a committee of industry participants (who may have relationships with or be competitors of the participant under investigation), directly undertakes the investigation of complaints and determines the appropriate sanctions against one of their number. As the ACCC has indicated:

“the problem with this is that justice would not appear to be done. The public perception almost inevitably would be that members were acting in their own interest, even when it is not the case”⁴.

On the basis of other industry self-regulatory schemes which has been authorised by the ACCC, the following process may ensure a level of independence to satisfy the ACCC and the ACA:

- complaints to be received and investigated on a confidential basis by an independent complaints investigator;
- the complaints investigator should have sufficient powers under the code to undertake an investigation, including to require production of documents by an industry participant and the investigator’s determination should be binding on the industry participants;
- the complaints investigator should not be subject to direction by any code, council, working group or board of directors in investigating and determining individual complaints. However, where a complaints investigator considers the relevant code to be ambiguous or that further guidance on code principles is required, the complaints investigator could seek that guidance from a code council, working group or board of directors subject to requests being made on a basis which protected the confidentiality of the complainant and industry participant; and
- the industry participant against whom an adverse determination had been made by the complaints investigator would have the right to appeal to an independent appeals adjudicator.

In developing complaint-handling procedures, regard should also be had to the Australian Standard on Complaints Handling (AS 4269).

The ACIF structure may provide an arms-length, independent industry based complaint resolution process which can be utilised for complaints under an individual operations code. Some issues which may need to be included in any complaints procedures include:

- who handles complaints initially;
- what time limits should be imposed on responding to a complaint;
- the obligation to give consumers reasons in writing if a complaint is rejected; and
- methods for collecting data on the numbers and types of complaints and the response rates and timetable taken in handling them.

⁴ ACCC, Guide to Fair Trading Codes of Conduct, draft, August 1995, p 15.

(ii) Collection of statistics on complaints handled

Information collected should include:

- the number of complaints lodged by whom separately identifying (end users and industry participant complaints, other industry members, etc.) and against whom;
- the number and percentage of complaints by subject matter;
- the number and percentage found to be in breach of the code and why;
- the number and percentage found not to be in breach of the code and why;
- the time taken to deal with complaints against target and percentage performance;
- how many items were monitored under each category;
- how many breaches were found through monitoring;
- number and type of sanctions imposed and remedies given; and
- number of matters outside the terms of reference and the reasons for the matter being outside the terms of reference.

Information collected and reported on complaints should be on an anonymous basis.

(iii) Sanctions

The primary focus of any code should be on achieving an industry consensus that the operations code presents a fair, competitively neutral and efficient means of dealing with the subject matter covered by the code, and that industry participants therefore have an incentive to comply. However, the efficacy of industry self-regulation ultimately will be undermined if the operations code cannot be enforced where more constructive efforts to achieve compliance have failed.

As noted above, the ACA has power to issue binding directions against an industry participant requiring compliance with a code approved by the ACA. While formal ACA involvement in enforcement is an important final safeguard, the industry self-regulatory philosophy also requires that the industry itself take steps to encourage and ensure compliance with industry codes.

Operations codes generally should include procedures for imposing sanctions on industry participants for breach of the code, although there may be some codes where the concept of sanctions is inappropriate. There should be a range of sanctions appropriate to both the nature of the individual breach and to previous compliance history by the industry participant which committed the breach. As a general principle, sanctions should be directed at putting in place actions which correct poor practices in industry. Higher level sanctions should be imposed only after corrective action has failed or if such sanctions are necessary to ensure compliance.

Competition law issues also may be relevant to both the procedure for imposing sanctions and for the nature and severity of sanctions. As discussed above in relation to complaint handling procedures, the process for imposing sanctions should be competitively neutral, impartial and provide for an appeal mechanism. While sanctions should fit the seriousness of the breach, overly severe sanctions may impact the competitiveness or financial viability of industry participants, and there will need to be strong safeguards before significant penalties can be imposed.

The code should clearly set out the range of sanctions and establish procedures:

- to clearly identify breaches;
- to hear the case against the member and to provide an opportunity for response;
- to decide on a penalty appropriate to the nature and seriousness of the breach (for example, censure, warning, corrective action, fine, suspension or expulsion, directions regarding the offender's compliance system);
- to give a member an opportunity to appeal to an independent body against a ruling, especially for suspension or expulsion; and
- to report a breach of the code that is also illegal or to initiate proceedings in a court or tribunal.

The code administration body should not be involved, for the reasons set out above, in imposing sanctions or determining the appropriate level of sanctions in individual cases. However, it may be appropriate for the code administration body or for the code itself to set out guidelines for the independent complaints investigator and appeal body about the circumstances in which particular sanctions would be appropriate.

The advice of the ACCC should be sought if sanctions are to include suspension or expulsion of industry members, particularly if there is a parallel obligation on other members not to deal with non-members or expelled members. The practical effect of these measures may be to force the expelled member out of the industry, which would amount to a 'collective boycott' in breach of the *Trade Practices Act*.

(iv) Administration of the Code

Subject to the final arrangements settled on for the ACIF, any code administration body or committee should have an independent chair and be made up of representatives of all stakeholders. In some circumstances, the relevant consumer body, such as the CCRP may be regularly consulted for code administration purposes.

If the operations code is made within the ACIF structure or sponsored by the ACIF, the ACIF Secretariat may assume responsibility for administering the code on a day to day basis but not including the resolution of complaints.

It also may be appropriate to include a representative of a relevant regulatory agency in an ex officio basis on a code body, committee or in the workings of code administration.

The plan for administration should be set out in the code document. While responsibilities of administration bodies will vary from industry to industry, typically they will include:

- monitoring and reporting on compliance;
- promoting, assisting and checking in-house compliance systems used by participants⁵;
- obtaining from members adequate finance for administering the code and preparing budgets and financial reports;
- appointing a conciliator or complaints body to handle disputes between members and members and end users complaints;
- arranging publicity for the code;
- making provision for employee awareness of the code;
- imposing agreed sanctions on members for breaches of the code (Note: To ensure an appropriate level of independence, it may be preferable to delegate this function to a suitable third party);

⁵ Please refer to AS 3806:1998 - Compliance Program

- conducting periodic reviews of the effectiveness of the code and its procedures and recommending amendments if necessary; and
- preparing annual and other reports on the operation of the code.

Section 4 PUBLICITY AND REPORTING

A code should set out:

- how the industry is to publicise its code, not just on its commencement but continually;
- what kinds of information industry and other stakeholders should be given and how to access and use such information;
- if there are aspects of the code which relate to end users, and if so, how the code is to be publicised to end users; and
- how and when industry participants and end users should be made aware of their rights and all the steps in the complaints process.

Publicity material needs to be written in plain English. Where information about an operations code needs to be provided to end users, some of it might also be produced in other languages, especially information on dispute resolution. The code administration body should consult with the TIO and with the CCRP about the form of any consumer information to be released about an operations code.

As part of publicity but also independently of it, the code should include requirements for the code administration body to report publicly, particularly to relevant stakeholders, at least annually. Where the operations code is included within the ACIF structure, the reporting arrangements of the ACIF will address this requirement.

Issues covered in a report might include:

- identified breaches of the code and the remedial action taken (on an anonymous basis);
- publicity and education programs;
- steps taken to address identified systemic complaints;
- statistics on complaints and disputes, and their resolution, classified in appropriate detail;
- monitoring of adherence to industry standards of quality, safety and conduct and to the principles and procedures of the code;
- whether performance indicators have been met;
- steps taken by industry participants in the development of in-house compliance systems;
- costs and other details of administration;
- continuous improvement in code principles and administration.; and
- developments in technology which are expected to have an impact on operations procedures covered by the code, and the steps proposed to be taken by the code administration body to address these issues.

Section 5 MONITORING, REVIEW AND AMENDMENTS

(i) Monitoring

Monitoring a code for compliance needs to be carried out regularly, systematically and visibly.

Monitoring arrangements should address such matters as:

- whether the code is addressing the problems it was designed to deal with;
- whether the code's terms of reference or objects are adequate to address current marketplace problems;
- whether members are complying with it;
- whether the rules are causing difficulties;
- whether the complaints handling system is working;
- whether the code has introduced anti-competitive effects or other market problems;
- whether there are industry developments or practices which will impact on the code or require a separate code to be drafted;
- who should conduct the monitoring. (In some cases it could be left to the code administration committee. In other cases or on other occasions, it could be wiser to use an independent body. The monitoring body could have non-industry and consumer representation); and
- how frequently the monitoring should be undertaken. (It needs to be ongoing but if there are indications of considerable non-compliance, monitoring should be undertaken more frequently.)

(ii) Reviewing

Performance indicators should be developed and implemented as a means of measuring the effectiveness of the code's operation. Examples include:

- quality of performance indicators against which an individual industry participant's compliance with the code and operations procedures and practices established under the code can be measured;
- a high level of awareness of the code amongst participants and other interested parties;
- easy accessibility of the code to industry participants and, where relevant, consumers; and
- decreased level of complaints received on specific issues.

Scope exists within the ACIF structure for setting up a Reference Panel made up of representatives of the end user/industry sector, relevant government agencies, and the code participants/service providers. Such a panel could be useful for:

- keeping the relevant interest groups up to date on developments;
- using as a sounding board for code rules/service standards and other issues;
- allowing for concerns to be raised at every stage;
- providing a forum for issues from different perspectives to be raised so that the different interests get a better understanding of the other's perspectives; and
- redrafted code rules/service standards could also be referred to the Reference Committee for their input and update.

A code must provide for a review of its operation at specified intervals, for example every 2 years or as needed. The process should involve consultation with every group affected by the code. Outside representatives could be included on the review panel or an outside body could be engaged to conduct the review independently.

The code should require that the review consider at least the following matters:

Effectiveness

- Are the code principles, rules and administration procedures appropriate, particularly given technological changes and developments in market conditions?
- Do the operations procedures established by the code ensure that the relevant industry participants are passing information between each other and coordinating their activities in an efficient and timely manner?
- Is the code being implemented and observed by participating firms?
- Are the market problems being corrected?
- What are the costs of industry participants complying with the operations practices and procedures established pursuant to the code?
- Are the benefits outweighing the costs?
- Are there more efficient, cost effective and expeditious means of achieving the matters covered by the code?
- Has the operation of the code affected competition beneficially or adversely?
- Has the code unintentionally created new market problems?
- Are industry members, whether code signatories or not applying the provisions of the code? Is code enforcement effective? Are industry members being regulated by an appropriate government agency?
- Are the terms of reference or objects dealing with current marketplace problems?

Complaint handling

- Do industry participants have arrangements in place to deal with complaints from other industry participants?
- Has there been a change in the number and type of complaints?
- Is data on complaints being fed back to members to change practices which cause complaints or to train staff how to avoid situations that lead to complaints?
- Are procedures for lodging complaints simple, easily accessible and well publicised?
- Is there a streamlined process for referring complaints to the appropriate body if they are misdirected?
- Do industry participants and, where relevant, end users have easy access to the complaints handling system? Are they satisfied with it?
- Are complaints being handled promptly?
- Are the internal and external complaints bodies able to make decisions independently, without pressures from elsewhere?
- Has the industry been called upon to impose sanctions? Did they work? Have sanctions imposed an unduly harsh burden on individual industry participants?

- Are the level and range of remedies adequate to deal with industry and end user problems?
- Does each firm have a consumer complaints system which meets the essential element requirements of the Australian Standard on Complaints Handling (AS 4269)?

Compliance

- What is the overall level of compliance with the code by industry participants?
- What compliance system does each participant have in place to ensure compliance with the code?

Administration

- Is the code administration, including complaints handling, adequately resourced to achieve the desired outcomes?
- What are the running costs of administering the code? What sort of costs are being imposed on members? Are lower cost options available?
- Is the code administration body providing regular reports on how the code is operating?

Visibility

- What is the awareness of the code? Groups concerned include:
 - members of industry;
 - employees; and
 - end users.
- How effective is publicity about the code?

Monitoring

- Is effective monitoring being undertaken to ensure compliance with the code?

Consultation

- How much consultation has there been with industry and end users?

Outside representation

- How effective has outside representation been?
- Are outside representatives satisfied that they can contribute adequately?

(iii) Amending

The code should include procedures for making necessary amendments. The procedures should require:

- consultation with industry participants, government agencies and end users during the framing of the amendment to ensure that it can work, is acceptable, and will not create other difficulties; and
- adequate publicity for the amendments.

The Reference Committee (referred to above in subsection (ii), 'Reviewing') may have a role to play in the development and implementation of amendment procedures.

Note Section 120 of the *Telecommunications Act 1997* deals with changes to an industry code, such that a change to a code requires replacement of that code. The Explanatory Memorandum states -

“This clause provides that changes to industry codes are to be achieved by replacement of the code. However, when the changes are of a minor nature, the requirements for consultation with participants in the section and the public in clauses 115(1)(e) and (f)⁶ do not apply to the registration process. This will limit consultation to when matters of substance arise and facilitate the making of minor changes to registered codes.”

⁶ Please note that following amendments to the Telecommunications Bill 1997, clause references in the Explanatory Memorandum may not correlate with sections of the Telecommunications Act 1997.

PART E - Framework for identifying a need for a code, and prioritising code development

E.1 Is an Industry Operations Code of Practice Required?

Reference to the following points will assist in determining whether it is appropriate to address an industry operations issue or activity via a code of practice:

- (i) Are there standards or procedures for the various inter-operator operations requirements, such as in any ACAF Access Code?
- (ii) Could the existing inter-operator operations practices and procedures be made more cost effective, efficient and pro-competitive?
- (iii) Has there been a history of unethical behaviour within the industry sector?
- (iv) Is there a determination already in place which deals with the issue?
- (v) Is there a need to ensure that efficient and cost effective practices are followed by certain sectors of the industry?
- (vi) Are there particular industry issues which need resolution to achieve pro-competitive outcomes?
- (vii) Is there a need to set standards and procedures for the provision of information between industry participants for specific purposes?
- (viii) Where a service between industry participants, is being provided does industry need to ensure the quality of service is of an acceptable standard?
- (ix) Is there a need to set industry standards and procedures to better ensure positive outcomes for end users. Does industry need a uniform understanding of requirements for a particular issue or service?
- (x) Is there a need to facilitate between industry participants (or to facilitate provision by industry participants to end users)-
 - improved access to services and products?
 - improved standards of quality and safety of services and products?
 - enhanced range of services and products available?
 - greater inter-operator efficiency or greater end user convenience?
 - improved standards of information exchanged between industry participants?
 - procedures for information exchange or disclosure?
- (xi) Is there an indication that there are problems with an operations practice?

(Other key determinants include the new telecommunications legislation, ACA or ACCC guidelines, the ACAF, feedback from the ACIF Advisory Assembly, or from the TIO.)

E.2 Prioritising Code Development Activities

Reference to the following points will assist in assessing priority for the development of codes of practice ?

- (i) Is there an identifiable need for measures to address the issue, evidenced by frequent/serious/excessive industry and/or end user complaints regarding the issue (e.g. complaints received by the ACIF, ACAE, ACA, CTN, ACCC, State Fair Trading Bureaux, TIO, etc.)?
- (ii) Would the implementation of a code of practice facilitate pro-competitive outcomes?
- (iii) Is impact systemic and/or does potential impact extend to large numbers of industry participants or end users in one or multiple industry sectors, or is the impact detrimental to a particular segment of the industry?
- (iv) Does the practice impact upon an industry sector or multiple sectors e.g. credit management, or does it relate to a single product or service?
- (v) Are there existing policies, minimum standards or existing codes of practice in the industry sector or sectors? Are they deficient? Would refinement be possible quickly?
- (vi) Are there industry or other legislative requirements which would facilitate development of the code?
- (vii) Are there other established and more appropriate mechanisms for dealing with such issues?
- (viii) Are there changes taking place within the industry which add weight to the need to address the specific issue?
- (ix) Will the code rules rectify systemic and recurring problems?
- (x) Is there potential for a problem to emerge regarding the issue, considering:
 - industry trends?
 - emerging industry products and techniques?
 - end user/industry preferences and concerns?
 - problems that have emerged in other jurisdictions?
- (xi) Are there identified operations practices which have led to systematic end user problems?

ATTACHMENT I - Telecommunications Act 1997

Part 6 - Industry codes and industry standards

Division 1 - Simplified outline

106 Simplified outline

The following is a simplified outline of this Part.

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

Division 2 - Interpretation

107 Industry codes

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

108 Industry standards

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

109 Telecommunications activity

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

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

110 Sections of the telecommunications industry

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

111 Participants in a section of the telecommunications industry

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

Division 3 - General principles relating to industry codes and industry standards

112 Statement of regulatory policy

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

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

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

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

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

- (1) If the Telecommunications Industry Ombudsman consents, an industry code or industry standard may confer functions and powers on the Telecommunications Industry Ombudsman.

- (2) The continuity of a consent under subsection (1) is not affected by:
 - (a) a change in the occupancy of the position of Telecommunications Industry Ombudsman; or
 - (b) a vacancy in the position of Telecommunications Industry Ombudsman that does not continue for more than 4 months.

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

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

116 Industry codes and industry standards not to deal with matters dealt with by codes and standards under codes and standards under Part IX 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 IV of the *Broadcasting Services Act 1992*.

Division 4 - Industry codes

117 Registration of industry codes

- (1) This section applies if:
 - (a) the ACA is satisfied that a body or association represents a particular section of the telecommunications industry; and
 - (b) that body or association develops an industry code that applies to participants in that section of the industry and deals with one or more matters relating to the telecommunications activities of those participants; and
 - (c) the body or association gives a copy of the code to the ACA; and
 - (d) the ACA is satisfied that:
 - (i) in a case where the code deals with matters of substantial relevance to the community-the code provides appropriate community safeguards for the matters covered by the code; or
 - (ii) in a case where the code does not deal with matters of substantial relevance to the community-the code deals with the matters covered by the code in an appropriate manner; and
 - (e) the ACA is satisfied that, before giving the copy of the code to the ACA:
 - (i) the body or association published a draft of the code and invited participants in that section of the industry to make submissions to the body or association about the draft within a specified period; and
 - (ii) the body or association gave consideration to any submissions that were received from participants in that section of the industry within that period; and
 - (f) the ACA is satisfied that, before giving the copy of the code to the ACA:
 - (i) the body or association published a draft of the code and invited members of the public to make submissions to the body or association about the draft within a specified period; and
 - (ii) the body or association gave consideration to any submissions that were received from members of the public within that period; and
 - (g) the ACA is satisfied that the ACCC has been consulted about the development of the code; and
 - (h) the ACA is satisfied that the Telecommunications Industry Ombudsman has been consulted about the development of the code; and
 - (i) the ACA is satisfied that at least one body or association that represents the interests of consumers has been consulted about the development of the Code; and
 - (j) in a case where the code deals with a matter set out in paragraph 113(3)(f)-the ACA is satisfied that the Privacy Commissioner has been consulted about the development of the code.
- (2) The ACA must register the code by including it in the Register of industry codes kept under section 136.
- (3) A period specified under subparagraph (1)(e)(i) or (1)(f)(i) must run for at least 30 days.

- (4) If:
- (a) an industry code (the *new code*) is registered under this Part; and
 - (b) the new code is expressed to replace another industry code;
- the other code ceases to be registered under this Part when the new code is registered.

118 ACA may request codes

- (1) If the ACA is satisfied that a body or association represents a particular section of the telecommunications industry, the ACA may, by written notice given to the body or association, request the body or association to:
- (a) develop an industry code that applies to participants in that section of the industry and deals with one or more specified matters relating to the telecommunications activities of those participants; and
 - (b) give the ACA a copy of the code within the period specified in the notice.
- (2) The period specified in a notice under subsection (1) must run for at least 120 days.
- (3) The ACA must not make a request under subsection (1) in relation to a particular section of the telecommunications industry unless the ACA is satisfied that:
- (a) the development of the code is necessary or convenient in order to:
 - (i) provide appropriate community safeguards; or
 - (ii) otherwise deal with the performance or conduct of participants in that section of the industry; and
 - (b) in the absence of the request, it is unlikely that an industry code would be developed within a reasonable period.
- (4) The ACA must not make a request under subsection (1) in relation to a code if:
- (a) the code would deal with a matter referred to in paragraph 113(3)(f) which relates to privacy; and
 - (b) compliance with the code would be likely to have the effect (whether direct or indirect) of requiring customer equipment, customer cabling, a telecommunications network or a facility:
 - (i) to have particular design features; or
 - (ii) to meet particular performance requirements.
- However, this rule does not apply if the ACA is satisfied that the benefits to the community from the operation of the code would outweigh the costs of compliance with the code.
- (5) The ACA may vary a notice under subsection (1) by extending the period specified in the notice.
- (6) Subsection (5) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.
- (7) A notice under subsection (1) may specify indicative targets for achieving progress in the development of the code (for example, a target of 30 days to develop a preliminary draft of the code).

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

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

120 Replacement of industry codes

- (1) Changes to an industry code are to be achieved by replacing the code instead of varying the code.
- (2) If the replacement code differs only in minor respects from the original code, section 117 has effect, in relation to the registration of the code, as if paragraphs 117(1)(e) and (f) had not been enacted.

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

121 Directions about compliance with industry codes

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

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

- (2) A person must comply with a direction under subsection (1).
- (3) A person must not:
 - (a) aid, abet, counsel or procure a contravention of subsection (2); or
 - (b) induce, whether by threats or promises or otherwise, a contravention of subsection (2); or
 - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of subsection (2); or
 - (d) conspire with others to effect a contravention of subsection (2).
- (4) Subsections (2) and (3) are *civil penalty provisions*.

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

122 Formal warnings-breach of industry codes

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

Division 5 - Industry standards

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

- (1) This section applies if:
 - (a) the ACA has made a request under subsection 118(1) in relation to the development of a code that is to:
 - (i) apply to participants in a particular section of the telecommunications industry; and
 - (ii) deal with one or more matters relating to the telecommunications activities of those participants; and
 - (b) any of the following conditions is satisfied:
 - (i) the request is not complied with;
 - (ii) if indicative targets for achieving progress in the development of the code were specified in the notice of request-any of those indicative targets were not met;
 - (iii) the request is complied with, but the ACA subsequently refuses to register the code; and
 - (c) the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard in order to:
 - (i) provide appropriate community safeguards in relation to that matter or those matters; or
 - (ii) otherwise regulate adequately participants in that section of the industry in relation to that matter or those matters.
- (2) The ACA may, by written instrument, determine a standard that applies to participants in that section of the industry and deals with that matter or those matters. A standard under this subsection is to be known as an *industry standard*.
- (3) Before determining an industry standard under this section, the ACA must consult the body or association to whom the request mentioned in paragraph (1)(a) was made.
- (4) A standard under subsection (2) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

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

- (1) This section applies if:
 - (a) the ACA is satisfied that a particular section of the telecommunications industry is not represented by a body or association; and
 - (b) the ACA has published a notice under subsection 117(1) relating to that section of the industry; and
 - (c) that notice:
 - (i) states that, if such a body or association were to come into existence within a particular period, the ACA would be likely to give a notice to that body or association under subsection 118(1); and
 - (ii) sets out one or more matters relating to the telecommunications activities of the participants in that section of the industry; and
 - (d) no such body or association comes into existence within that period; and
 - (e) the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard in order to:
 - (i) provide appropriate community safeguards in relation to that matter or those matters; or
 - (ii) otherwise regulate adequately participants in that section of the industry in relation to that matter or those matters.
- (2) The ACA may, by written instrument, determine a standard that applies to participants in that section of the industry and deals with that matter or those matters. A standard under this subsection is to be known as an *industry standard*.
- (3) A standard under subsection (2) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act* 1901.

125 ACA may determine industry standards where industry codes fail

- (1) This section applies if:
 - (a) an industry code that:
 - (i) applies to participants in a particular section of the telecommunications industry; and
 - (ii) deals with one or more matters relating to the telecommunications activities of those participants;

has been registered under this Part for at least 180 days; and
 - (b) the ACA is satisfied that the code is deficient (as defined by subsection (7)); and
 - (c) the ACA has given the body or association that developed the code a written notice requesting that deficiencies in the code be addressed within a specified period; and
 - (d) that period ends and the ACA is satisfied that it is necessary or convenient for the ACA to determine a standard that applies to participants in that section of the industry and deals with that matter or those matters.

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

126 Industry standards not to be determined for certain privacy matters

The ACA must not determine an industry standard if:

- (a) the standard would deal with a matter referred to in paragraph 113(3)(f) (which relates to privacy); and
- (b) compliance with the standard would be likely to have the effect (whether direct or indirect) of requiring customer equipment, customer cabling, a telecommunications network or a facility;
 - (i) to have particular design features; or
 - (ii) to meet particular performance requirements. However, this rule does not apply if the ACA is satisfied that the benefits to the community from the operation of the standard would outweigh the costs of compliance with the standard.

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

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

128 Compliance with industry standards

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

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

129 Formal warnings - breach of industry standards

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

130 Variation of industry standards

- (1) The ACA may, by written instrument, vary an industry standard that applies to participants in a particular section of the telecommunications industry if it is satisfied that it is necessary or convenient to do so to:
 - (a) provide appropriate community safeguards in relation to one or more matters relating to the telecommunications activities of those participants; and
 - (b) otherwise regulate adequately those participants in relation to one or more matters relating to the telecommunications activities of those participants.
- (2) An instrument under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

131 Revocation of industry standards

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

132 Public consultation on industry standards

- (1) Before determining or varying an industry standard, the ACA must:
 - (a) cause to be published in a newspaper circulating in each State a notice:
 - (i) stating that the ACA has prepared a draft of the industry standard or variation; and
 - (ii) stating that free copies of the draft will be available to members of the public during normal office hours throughout the period specified in the notice; and
 - (iii) specifying the place or places where the copies will be available; and
 - (iv) inviting interested persons to give written comments about the draft to the ACA within the period specified under subparagraph (ii); and
 - (b) make copies of the draft available in accordance with the notice.
- (2) The period specified under subparagraph (1)(a)(ii) must run for at least 30 days after the publication of the notice.
- (3) Subsection (1) does not apply to a variation if the variation is of a minor nature.
- (4) If interested persons have given comments in accordance with a notice under subsection (1), the ACA must have due regard to those comments in determining or varying the industry standard, as the case may be.
- (5) In this section:

State includes the Northern Territory and the Australian Capital Territory.

133 Consultation with ACCC and the Telecommunications Industry Ombudsman

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

134 Consultation with Privacy Commissioner

- (1) This section applies to an industry standard that deals with a matter set out in paragraph 113(3)(f).
- (2) Before determining or varying the industry standard, the ACA must consult the Privacy Commissioner.
- (3) Before revoking the industry standard under subsection 131(1), the ACA must consult the Privacy Commissioner.

135 Consultation with consumer body

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

Division 6 - Register of industry codes and industry standards

136 ACA to maintain Register of industry codes and industry standards

- (1) The ACA is to maintain a Register in which the ACA includes:
 - (a) all industry codes required to be registered under this Part; and
 - (b) all industry standards; and
 - (c) all requests made under section 118; and
 - (d) all notices under section 119; and
 - (e) all directions given under section 121.
- (2) The Register may be maintained by electronic means.
- (3) A person may, on payment of the charge (if any) fixed by a determination under section 53 of the *Australian Communications Authority Act 1997*:
 - (a) inspect the Register; and
 - (b) make a copy of, or take extracts from, the Register.
- (4) For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the ACA gives the person a printout of, or of the relevant parts of, the Register.
- (5) If a person requests that a copy be provided in an electronic form, the ACA may provide the relevant information:
 - (a) on a data processing device; or
 - (b) by way of electronic transmission.

ATTACHMENT II - Divisions 1 and 2 of Part XIB of the Trade Practices Act 1974

Part XIB - The telecommunications industry:
anti-competitive conduct and record-keeping rules

Division 1 - Introduction

151AA Simplified outline

The following is a simplified outline of this Part.

- This Part sets up a special regime for regulating anti-competitive conduct in the telecommunications industry. The regime applies in addition to Part IV.
- The Part sets out the circumstances in which carriers and carriage service providers are said to **engage in anti-competitive conduct**.
- A carrier or carriage service provider must not engage in anti-competitive conduct. This rule is called the **competition rule**.
- The Commission may issue a notice stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule. The notice is called a **competition notice**.
- A competition notice is prima facie evidence of the matters in the notice.
- The Commission may make an order exempting specified conduct from the scope of the definition of **anti-competitive conduct**. The order is called an **exemption order**.
- Carriers and carriage service providers may be directed to file tariff information with the Commission. The direction is called a **tariff filing direction**.
- The Commission may make record-keeping rules that apply to carriers and carriage service providers.

151AB Definitions

In this Part, unless the contrary intention appears:

ACA means the Australian Communications Authority.

anti-competitive conduct has the meaning given by section 151AJ.

carriage service has the same meaning as in the *Telecommunications Act 1997*.

carriage service provider has the same meaning as in the *Telecommunications Act 1997*.

carrier has the same meaning as in the *Telecommunications Act 1997*.

carrier licence has the same meaning as in the *Telecommunications Act 1997*.

competition notice means a notice under section 151AL.

competition rule means the rule set out in section 151AK.

data processing device means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

eligible partnership has the same meaning as in the *Telecommunications Act 1997*.

exemption order means an order under section 151BA.

facility has the same meaning as in the *Telecommunications Act 1997*.

Federal Court means the Federal Court of Australia.

person includes a partnership.

Note: Section 151CH sets out additional rules about partnerships.

record-keeping rule means a rule under section 151BU.

service provider rule has the same meaning as in the *Telecommunications Act 1997*.

tariff filing direction means a direction under section 151BK.

telecommunications market has the meaning given by section 151AF

151AC Extension to external Territories

This Part, and the other provisions of this Act so far as they relate to this Part, extend to each eligible Territory (within the meaning of the *Telecommunications Act 1997*).

151AD Continuity of partnerships

For the purposes of this Part, a change in the composition of a partnership does not affect the continuity of the partnership.

151AE Additional operation of Part

- (1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.
- (2) This Part has, by force of this subsection, the effect it would have if:
 - (a) any references in this Part to a carrier were, by express provision, confined to a carrier that is a corporation; and
 - (b) any references in this Part to a carriage service provider were, by express provision, confined to a carriage service provider that is a corporation.
- (3) In addition to the effect that this Part has as provided by subsection (2), this Part has, by force of this subsection, the effect it would have if subsections 151AJ(2) and (3) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:
 - (a) trade or commerce between Australia and places outside Australia; or
 - (b) trade or commerce among the States; or
 - (c) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (d) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth.

151AF Telecommunications market

For the purposes of this Part, a *telecommunications market* is a market in which any of the following goods or services are supplied or acquired:

- (a) carriage services;
- (b) goods or services for use in connection with a carriage service;
- (c) access to facilities.

Note: Market has a meaning affected by section 4E.

151AG When a body corporate is related to a partnership

For the purposes of this Part, if:

- (a) a carrier or a carriage service provider is a partnership; and
- (b) a body corporate is related to a partner in the partnership;

the body corporate is taken to be *related to* the carrier or carriage service provider, as the case requires.

151AH Degree of power in a telecommunications market

(1) For the purposes of this Part, if:

- (a) a body corporate is related to:
 - (i) a carrier; or
 - (ii) a carriage service provider; and
- (b) the body corporate has a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a *substantial degree of power* in that market.

(2) For the purposes of this Part, if:

- (a) 2 or more bodies corporate are related to the one:
 - (i) carrier; or
 - (ii) carriage service provider; and
- (b) those bodies corporate together have a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a *substantial degree of power* in that market.

(3) For the purposes of this Part, if:

- (a) a body corporate is related to:
 - (i) a carrier; or
 - (ii) a carriage service provider; and
- (b) the body corporate and the carrier or carriage service provider, as the case may be, together have a substantial degree of power in a telecommunications market;

the carrier or carriage service provider, as the case requires, is taken to have a *substantial degree of power* in that market.

- (4) For the purposes of this Part, if:
- (a) 2 or more bodies corporate are related to:
 - (i) a carrier; or
 - (ii) a carriage service provider; and
 - (b) those bodies corporate and that carrier or carriage service provider, as the case may be, together have a substantial degree of power in a telecommunications market;
- the carrier or carriage service provider, as the case requires, is taken to have a substantial degree of power in that market.
- (5) In determining, for the purposes of this Part, the degree of power that a person has, or that persons have, in a telecommunications market, regard must be had to the extent to which the conduct of the person or any of those persons in that market is constrained by the conduct of:
- (a) competitors, or potential competitors, of the person or of any of those persons in that market; or
 - (b) persons to whom or from whom the person or any of those persons supplies or acquires goods or service in that market.
- (6) Subsection (5), does not, by implication, limit the matters to which regard may be had in determining, for the purposes of this Part, the degree of power that a person has, or that persons have, in a telecommunications market.
- (7) In this Part:
- (a) a reference to *power* is a reference to market power; and
 - (b) a reference to power in relation to, or to conduct in, a telecommunications market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

151AI Interpretation of Part IV or VII not affected by this Part

In determining the meaning of a provision of Part IV or VII, the provisions of this Part are to be ignored.

Division 2 - Anti-competitive conduct

151AJ Anti-competitive conduct

- (1) This section sets out the 2 circumstances in which:
- (a) a carrier or
 - (b) a carriage service provider
- is said to *engage in anti-competitive conduct* for the purposes of this Part.
- (2) A carrier or carriage service provider *engages in anti-competitive conduct* if the carrier or carriage service provider:
- (a) has a substantial degree of power in a telecommunications market; and
 - (b) takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market.

- (3) A carrier or carriage service provider *engages in anti-competitive conduct* if the carrier or carriage service provider:
- (a) engages in conduct in contravention of section 45, 45B, 46, 47 or 48; and
 - (b) the conduct relates to a telecommunications market.
- (4) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation, in determining whether conduct of the carrier or provider is in contravention of section 45, 45B, 46, 47 or 48, it is to be assumed that each reference in those sections to a corporation included a reference to a carrier, or a carriage service provider, that is not a corporation.
- (5) For the purposes of the application of subsection (3) to a carrier, or a carriage service provider, that is not a corporation or a partnership, in determining whether conduct of the carrier or provider is in contravention of section 45, 45B, 46, 47 or 48, the following assumptions are to be made:
- (a) the assumption that the expression 'or any body corporate related to such a corporation' were omitted from subsection 45(3);
 - (b) the assumption that the expression 'or a body corporate related to the corporation' were omitted from paragraph 45(4)(b);
 - (c) the assumption that the expression 'or a body corporate that is related to the corporation' were omitted from paragraph 46(1)(a);
 - (d) the assumption that subsection 46(2) had not been enacted;
 - (e) the assumption that the expression 'or from a competitor of a body corporate related to the corporation' were omitted from each of the following provisions:
 - (i) paragraphs 47(2)(d) and (e);
 - (ii) paragraphs 47(3)(d) and (e);
 - (iii) subparagraphs 47(8)(a)(i) and (ii);
 - (f) the assumption that the expression 'not being a body corporate related to the corporation' were omitted from paragraphs 47(8)(c) and 49(9)(d);
 - (g) the assumption that the expression 'or from a competitor of a body corporate related to the corporation' were omitted from paragraphs 47(9)(a) and (b);
 - (h) the assumption that the expression, 'or by a body corporate related to the corporation,' were omitted from paragraph 47(10)(b);
 - (i) the assumption that the expression 'or any body corporate related to that corporation' were omitted from subparagraph 47(13)(b)(i);
 - (j) the assumption that the expression 'or any body corporate related to either of those corporations' were omitted from paragraph 47(13)(c) and the expression 'any body corporate related to the last-mentioned corporation' were substituted;
 - (k) the assumption that the expression 'where the second person mentioned in that paragraph is a corporation' were omitted from subsection 96(2).

- (6) A person may be taken to have engaged in anti-competitive conduct even if the conduct involves the exercise, or proposed exercise, of an existing legal or equitable right (whether under a contract or otherwise).
- (7) Despite anything in subsection (2) or (3), a carrier or carriage service provider does not engage in anti-competitive conduct if that conduct does not constitute a contravention of section 45, 45B, 46, 47 or 48:
 - (a) because an authorisation is in force; or
 - (b) because of the operation of section 93.
- (8) A carrier or carriage service provider does not engage in anti-competitive conduct if that conduct occurred before 1 July 1997.

151AK The competition rule

- (1) A carrier or carriage service provider must not engage in anti-competitive conduct.
- (2) For the purposes of this Part, the rule set out in subsection (1) is to be known as the *competition rule*.

Note: For enforcement of the competition rule, see Division 7.

AUSTRALIAN COMMUNICATIONS INDUSTRY FORUM LTD (ACIF)

The Australian Communications Industry Forum Ltd (ACIF) is a communications self-regulatory body established in 1997 by the industry to manage communications self-regulation within Australia.

The primary role of ACIF is to develop and administer Technical Standards, Industry Codes of Practice and industry support services that promote both the long-term interest of end-users and the efficiency and international competitiveness of the Australian communications industry.

ACIF is an industry initiative, funded and resourced by the industry, with a membership that encompasses all industry sectors. ACIF comprises a Board, Advisory Assembly, Executive, six standing Reference Panels and a number of task-specific Working Committees.

Technical Standards and Industry Codes are prepared by Working Committees made up of experts from industry, consumer, government, and other bodies. The requirements or recommendations contained in ACIF's published documents are a consensus of views of representative interests and also take into account comments received from other sources.

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