



Australian Government
The Treasury

Policy Guidelines On Prescribing Industry Codes

under part IVB of the
Competition and Consumer Act 2010

May 2011

Prescribed codes of conduct

Policy guidelines on prescribing industry codes under
Part IVB of the *Competition and Consumer Act 2010*

May 2011

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FOREWORD



I am pleased to release these updated guidelines on the prescription of industry codes of conduct under the *Competition and Consumer Act 2010* (CCA).

Enforceable industry codes of conduct were introduced in 1998. While industry codes of conduct are rarely used, they are in force in a number of industries to encourage improved conduct. These include:

- in the horticulture industry, to address a power imbalance between farmers and food wholesalers;
- in the oil industry, to improve transparency of pricing and to assist industry participants to make more informed decisions when entering, renewing or transferring a fuel re-selling agreement by requiring the disclosure of specific information;
- in the franchising sector, to address issues of information asymmetry and power imbalance between franchisors and franchisees; and
- in the supermarket sector, to make it compulsory for certain grocery retailers to use unit pricing when selling non-exempt grocery items to consumers.

Where possible, markets should be allowed to operate without excessive regulation. There are clear benefits for industries who establish high standards of conduct for businesses that operate in their sector, including through self-regulating industry codes. This gives consumers and businesses faith that there is a framework in place that encourages best practice and offers appropriate redress when needed.

Where there are serious issues affecting the efficient operation of markets, or even total failures of those markets, it is appropriate for the Government to intervene. Where self regulation has not succeeded and a legislative solution is not appropriate, prescription of an industry code of conduct allows the Government to provide a clear set of rules to define the best practice for conduct of participants in an industry.

If industry decides it wishes to pursue an enforceable code of conduct, it must make a compelling case before an industry code of conduct will be prescribed. Any such case will require extensive consultation and will need to stack up against detailed analysis.

I hope that these guidelines will assist those who may be considering whether a prescribed code of conduct is appropriate, in terms of both the general process that applies but also the types of considerations that may be taken into account by the Government when deciding whether to prescribe an industry code of conduct under the CCA to apply to a particular industry.

A stylized, handwritten signature in black ink, appearing to read 'David Bradbury'.

The Hon David Bradbury MP
Parliamentary Secretary to the Treasurer

Contacts

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For information about specific codes, please contact the following:

Franchising Code of Conduct:
Department of Innovation, Industry, Science and Research
www.innovation.gov.au

OilCode:
Department of Resources, Energy and Tourism
www.ret.gov.au

Horticulture Code of Conduct :
Department of Agriculture, Fisheries and Forestry
www.daff.gov.au

For information about the enforcement of industry codes under the CCA, please contact:

Group General Manager
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23 Marcus Clarke Street
CANBERRA ACT 2601
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WHAT ARE INDUSTRY CODES OF CONDUCT?

This document sets out policy guidelines for the consideration of proposals to prescribe voluntary or mandatory industry codes under Part IVB of the CCA.

Part IVB of the CCA provides for the prescription of mandatory or voluntary industry codes. An 'industry code' is defined as a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. Section 51AD of the CCA states that a person must not contravene, in trade or commerce, an applicable industry code. An 'applicable industry code' is defined as, in relation to a corporation that is a participant in an industry, the prescribed provisions of any mandatory industry code relating to the industry and the prescribed provisions of any voluntary industry code that binds the corporation.

Section 51AE of the CCA allows industry codes to be prescribed in regulations proposed by the responsible Australian Government Minister. Mandatory codes are binding on all industry participants. Voluntary codes are binding on only those members of an industry or profession that have agreed to be bound by the code.

Prescribed codes must address specific problems and drafted in clear and unambiguous terms that set out requirements and obligations rather than aims and ideals.

The Australian Competition and Consumer Commission (ACCC) keeps a public register of companies bound by voluntary codes. Prescribed industry codes are enforceable by the ACCC or by private action under the CCA, with a wide range of remedies available, including injunctions and damages.

As of April 2011, four mandatory industry codes and no voluntary industry codes have been prescribed, these are:

- franchising (Franchising Code of Conduct — introduced in 1998);
- horticulture producers and wholesalers (Horticulture Code of Conduct — introduced in 2006);
- wholesale oil supply (Oil Code — introduced in 2006); and
- unit pricing for supermarket products (Retail Grocery Industry Unit Pricing Code — introduced in 2009).

Further information and guidance on the current prescribed industry codes can be found at the ACCC's website, www.accc.gov.au.

ISSUES RELEVANT TO CONSIDERATION OF PRESCRIBING AN INDUSTRY CODE UNDER THE *COMPETITION AND CONSUMER ACT 2010*

A COMPELLING CASE FOR REGULATORY INTERVENTION

The Australian Government has reaffirmed its commitment to a rigorous system for assessing the impact of regulatory proposals and alternative options. The Government's Regulatory Impact Analysis requirements promote well designed regulation by:

- requiring a case to be established for acting in response to a perceived policy problem, including addressing whether regulatory action is required;
- assessing the impact of a range of alternative options to achieve the policy objective;
- encouraging transparent, timely and meaningful consultation with affected parties;
- assisting decision makers to understand the full range of costs and benefits of their decision, at the time they are making their decision; and
- making the information available to government decision-makers publicly available.

This is an internationally recognised framework, and has been strongly commended in a recent review by the OECD¹.

Applying this framework to industry codes, the most obvious alternative to a mandatory industry code is a voluntary code of conduct that is administered by the participants in an industry. In most cases, the net benefit of effective self regulation will exceed that of government intervention. This is the case for a number of reasons, including:

- Industry participants are usually better placed to tailor codes of practice to the business conditions and other circumstances facing an industry.
- Self regulation will often impose lower compliance costs on business than government regulation.
- Self regulation is more flexible, as voluntary codes of conduct can be amended by industry participants as required, independent of governmental and parliamentary processes.
- Self regulation does not impose costs on government in terms of implementation, compliance monitoring and enforcement action.

Accordingly, codes of conduct which can be effectively developed, implemented and enforced by the participants in an industry are generally to be preferred over the prescription of industry codes in law. An industry will generally only be subject to government intervention where there is a demonstrable problem affecting other participants or consumers which the market cannot or will not overcome.

¹ OECD, *OECD Reviews of Regulatory Reform: Australia - Towards a seamless national economy*, 2010, pp. 15.

THE PROCESS FOR INITIATING A PROPOSAL FOR PRESCRIPTION OF AN INDUSTRY CODE

Responsibility for prescribing an industry code lies with the Minister with responsibility for Part IVB of the CCA, who is the Parliamentary Secretary to the Treasurer.

In this document, a reference to the Minister or the responsible Minister is a reference to the Parliamentary Secretary to the Treasurer, who has responsibility for matters that arise under Part IVB of the CCA, along with other provisions of the CCA that relate to competition or consumer affairs.

Other Ministers may have policy responsibility for areas covered by, or proposed to be covered by, prescribed industry codes. For example, the Minister for Resources and Energy has policy responsibility for matters that are dealt with by the Oil Code. In such cases, a proposal to prescribe an industry code may be raised by the responsible Minister.

Regulations to prescribe an industry code or to make amendments to a prescribed industry code would be made by the Minister. Such authority would be required at two stages, first for the policy being proposed prior to a process of public consultation being initiated on the proposal and secondly, for the text of any regulations to be made to prescribe an industry code.

Industry participants or other persons affected by conduct occurring within a particular industry may bring proposals for the prescription of an industry code to the attention of the Government. They may do so by either raising the relevant matter with the Minister with policy responsibility over a particular area of activity, or by raising it with the Parliamentary Secretary to the Treasurer. In either case, the relevant Minister and the Parliamentary Secretary to the Treasurer will consult each other before deciding to commence a process that might lead to the prescription of an industry code.

IS A PRESCRIBED INDUSTRY CODE THE APPROPRIATE MECHANISM?

Industry codes are co-regulatory measures, designed to achieve minimum standards of conduct in an industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified. A prescribed industry code will not be considered if another regulatory regime applies to a particular industry.

Other regulatory regimes

Many areas of business activity are regulated under industry-specific legislation that applies at State, Territory or Commonwealth level. As a general principle, the Minister would not propose prescription of industry codes that apply to industries regulated under other legislation. Examples include:

- in the telecommunications industry, the *Telecommunications Act 1997* provides for the registration and enforcement of industry codes of conduct by the Australian Communications and Media Authority;
- the Therapeutic Goods Administration can mandate product standards and manufacturing principles for drugs and other health products under the *Therapeutic Goods Act 1989*;
- the financial sector is regulated under the *Australian Securities and Investments Commission Act 2001*; and
- States and Territories have mandated various industry codes under their respective fair trading laws.

CRITERIA APPLICABLE TO A DECISION TO PRESCRIBE AN INDUSTRY CODE

Where a problem has been characterised as one that might be appropriately addressed through a prescribed industry code, the Minister considers the following factors when deciding whether prescription under the CCA is appropriate. The Minister may have regard to other relevant factors in addition to these criteria.

If, after a preliminary assessment of these criteria and other relevant matters, the Minister is satisfied that there are sufficient grounds for the making of a code, will he embark on the public consultation and regulatory processes involved in the prescription of an industry code.

A. IDENTIFICATION OF A PROBLEM, AND EXISTING REGULATION THAT APPLIES, WITHIN AN INDUSTRY

For any form of new regulation to be considered, including the prescription of an industry code, a problem should be identified and a case must be made to indicate that additional regulation is needed.

The nature and magnitude of the problem should be identified with precision, to ensure that regulation is being adequately targeted. Problems that might be effectively addressed by industry codes will usually involve market failure such as misuse of market power, asymmetric information or the presence of externalities.

All existing regulation should be considered, at the national, State and Territory levels, as it applies to the identified problem, to ensure that the relevant industry regulation is not either currently addressing the problem or capable of addressing the problem with more active enforcement.

B. EFFECTIVENESS OF ANY INDUSTRY SELF-REGULATORY MEASURES

Given the identified benefits of self regulation, industry codes would not generally be prescribed unless evidence exists to indicate that self regulation has been attempted within an industry and failed to address the identified problem.

If an industry has not sought to self regulate to address an issue it may suggest that there is the potential for that to occur before prescription of an industry code is considered.

C. OTHER REGULATORY OPTIONS

All regulatory and non-regulatory options that may address the identified problem should be considered. This includes no action and reliance on existing regulation, such as the generic competition and consumer provisions of the CCA. There should be clear evidence that the market is incapable of addressing the problem without additional government intervention to justify the need for a prescribed industry code.

D. GOALS OF A PRESCRIBED INDUSTRY CODE

The goals of a prescribed industry code should be clearly identified and there should be clear evidence that they are achievable.

The primary goal of an industry code, from the perspective of the Australian Government, is that it enhances the wellbeing of the Australian people. This might be achieved by reducing complexity that industry participants or consumers are required to deal with, by reducing risks, by ensuring that industry participants are afforded some measure of fairness in their dealing with other industry participants, or by increasing the aggregate output from a particular industry.

Industry codes are not, as a general proposition, designed to address circumstances in which smaller participants in an industry experience competitive pressures that relate to limited access to economies of scale in purchasing, bargaining or access to markets. If this is the case, there should be compelling evidence to indicate that the problems experienced are so significant that they have effects beyond individual firms or groups of firms within an industry, such that there is a public interest in the prescription of an industry code.

The form of a proposed industry code

A code should be drafted simply and clearly and avoid complexity and ambiguity. It should also be drafted to address specific problems and in terms of requirements and obligations, not aims and ideals. Its provisions should be enforceable and consistent with concepts used in related legislation, particularly the *Competition and Consumer Act 2010*.

A mandatory code of conduct is not a mechanism for restricting or controlling competition in a market, by imposing barriers to entry or permitting anti-competitive activity. Nor is it a way of circumventing the operation of other parts of the *Competition and Consumer Act 2010*.

A code should be drafted in such a way as to avoid:

- any actual or potential anti-competitive effects arising from its terms; and
- unnecessary limitations or intrusions into normal commercial decision making.

Those proposing a code should also contemplate alternative dispute resolution systems prior to any resort to the remedies available under the *Competition and Consumer Act 2010*, and to the extent that it is legally possible and appropriate, these systems may be incorporated into the proposed code.

E. BENEFIT-COST ANALYSIS

As applies to all regulation making within the Commonwealth, a rigorous impact (benefits and costs) analysis is necessary to inform decision makers on the likely merits of prescribing an industry code.

The analysis should be assessed as adequate by the Office of Best Practice Regulation (OBPR) according to the criteria set out in Part 3.5 of the *Best Practice Regulation Handbook*.

The Minister will consider the costs and benefits of a proposal on an interim basis before deciding to embark on the process of prescribing an industry code.

PROCESS AND CONSULTATION AFTER A DECISION TO PRESCRIBE AN INDUSTRY CODE

If there is agreement that an industry code of conduct should be prescribed, a process can be commenced that may lead to a code being prescribed. That process can be divided into five steps. It is anticipated that the prescription of an industry code would take at least six months. The stages in the process of prescribing an industry code are:

STAGE 1: NOTIFICATION OF INDUSTRY PARTICIPANTS AND THE ACCC

Key stakeholders, including the relevant industry association, will be notified by the responsible Department that the Minister is considering prescribing an industry code.

The Minister will also consult with States and Territories, initially through the Standing Committee of Officials of Consumer Affairs, to ensure that the proposal does not duplicate any industry regulation applying in States or Territories.

Advice will be sought from the ACCC on any competition impacts of a code proposed for prescription.

The ACCC and industry participants will be invited, at this stage to make any submissions related to whether an industry code should, or should not, be prescribed. Such submissions would most likely be based on the criteria outlined earlier in this document.

Depending on the outcome of this consultation process, the Minister may decide, at this stage of the process, that an industry code should not be prescribed.

STAGE 2: DEVELOPMENT OF A DRAFT REGULATION IMPACT STATEMENT

The responsible Department will prepare a draft Regulation Impact Statement. This analysis will necessarily outline:

- the relevant problems or issues giving rise to the proposal to prescribe a code;
- the desired objectives of a prescribed code;
- options for achieving the objectives, including but not confined to prescription of the code under the CCA;
- an evaluation of each different option in terms of costs and benefits for consumers, businesses, government and the community generally;
 - such an analysis should not be confined to direct financial costs and benefits such as administration and compliance costs, but should also look at broad social and economic costs such as the likely impact on competition;
- a preliminary conclusion as to why a prescribed code is the preferred option; and
- a draft implementation strategy.

The responsible Department will release the Draft Regulation Impact Statement for public comment.

STAGE 3: FINAL REGULATION IMPACT STATEMENT

At the conclusion of consultation with industry, the responsible Department will revise the draft Regulation Impact Statement in the light of information and views put forward in the consultation process. In addition, the responsible Department will prepare a consultation statement, outlining the opportunities that have been provided for stakeholders to comment on the code, together with a summary of the main issues raised. The final assessment will be submitted to the Office of Best Practice Regulation for approval (OBPR).

In the light of analysis of the Regulation Impact Statement by OBPR, the responsible Minister and the Minister will consider the Regulation Impact Statement and any comments arising from consultation on the Draft Regulation Impact Statement, and may decide, at this stage of the process, that an industry code should not be prescribed if it is not possible to demonstrate that the benefits of the proposal exceed its costs.

STAGE 4: MAKING REGULATIONS

The Minister, or, subject to the agreement of the Minister, the responsible Minister, will submit the relevant industry code to the Federal Executive Council for approval.

If the Executive Council approves prescription of the industry code, the Governor-General will be asked to make Regulations to this effect. The Regulations will be gazetted. The prescribed industry code will be a Schedule to the Regulations, rather than merely being referred to in the Regulations, so that it will have the greatest possible public exposure by forming part of databases of Commonwealth regulations.

The Minister, or, subject to the agreement of the Minister, the responsible Minister, will lay the Regulations before both Houses of the Parliament. Parliament may disallow prescription of the industry code. The Parliament may also ask the Minister to amend the Regulations to overcome any deficiencies that it identifies.

STAGE 5: REVIEWING THE CODE

Codes of conduct that are prescribed under the CCA will be reviewed at least every five years in consultation with industry, consumers and business. It is expected that the responsible Department would be responsible for the conduct of this review. Some industry codes will be reviewed after a shorter period of operation, depending on the circumstances. For example, the Franchising Code was reviewed a relatively short time after it commenced.

ENFORCEMENT OF PRESCRIBED CODES OF CONDUCT

Prescribed industry codes of conduct are enforceable by the ACCC or by private action under the CCA, with a wide range of remedies available. These include:

- injunctions to either restrain a person from doing something or require a person to do a particular thing (section 80);
- damages to compensate for their loss or damage resulting from a contravention of a code (section 82);
- non-punitive orders such as community service orders (section 86C — only on application of the ACCC); and
- other compensatory orders (section 87).

Industry codes are complementary to general prohibitions on unfair practices that may occur in trade or commerce, and should encourage compliance and focus of remedies rather than simply seeking to punish contraventions.

ENHANCEMENTS TO ENFORCEMENT OF INDUSTRY CODES

The *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* enhanced the enforcement mechanisms available for breaches of industry codes. These measures commence on 1 January 2011.

These measures include allowing the ACCC to issue public warning notices in relation to suspected breaches and to seek redress for affected parties without having to join them as a party to court action.

The ACCC has a new random audit power for inspecting documents or other information required to be held pursuant to an industry code. The random audit power is framed without a threshold requiring belief that a breach might have occurred. This will assist the ACCC in situations where significant imbalances in bargaining power between industry participants makes less powerful participants hesitant to report instances of contraventions of industry codes by more powerful industry participants to the ACCC, for fear of retaliatory action.