

## **CODES OF CONDUCT**

### **Why are Codes of Conduct becoming more prevalent?**

Codes of Conduct can affect your business just as much as laws that have been passed by Parliament.

Codes are part of a series of regulatory reforms designed to improve compliance as well as reduce costs to Government and business. At the same time regulators are being asked to “do more with less”.

Codes of Conduct were created as a compromise between Governments’ reluctance to impose detailed legislative regulation on industries that were changing and not having any regulation at all. The compromise offered by a range of industries from financial services through to franchising was self-regulation.

Governments now consider industry self-regulation as a prime regulatory option. In fact, by 1997 a staggering total of 30,000 codes of practice were identified in a review.

Whilst it is possible for consumers and regulators such as the ACCC to take individual action against companies to enforce the law, court actions always take time and are costly. Even when the law is clear, its actual application depends on the facts. Lawmakers are reluctant to prescribe detailed procedures and industry always resists such prescription.

So the view of the Government and regulators was that if an industry could develop a code which met certain criteria, they would be satisfied. Codes of conduct are not necessarily the same as codes of best practice.

### **What is a Code?**

A code originally meant a complete collection of laws on a single topic avoiding inconsistency and overlapping.

It is important to distinguish voluntary codes from legislative codes and mandatory codes. Under Part IVB of the Trade Practices Act some Codes (eg the Franchising Code and the Oil Code) are mandatory; this is usually because self-regulation in certain industry-wide issues does not work. A legislative code is actually a law.

Voluntary codes of conduct typically make provision for minimum standards of performance of conduct while leaving to the regulated party discretion as to how that standard will be achieved. It is therefore possible for a number of businesses to comply with their relevant code of conduct but do it in different ways. Industry specific codes allow variations and competition within an industry in a way that prescriptive legislation could not. That is why codes of conduct are often called codes of practice.

Codes are now so well accepted as a form of regulation that the ACCC has issued guidelines setting out how to develop a code of conduct. This guide is a reference

document for any organisation seeking to produce effective fair trading outcomes and is largely based on best practice examples already operating in the market place.

Codes range from the home workers code to the cinema code, medicines code, franchising code, direct marketing, electricity market, gas access code, telecommunications towers access code, to name a few.

### **What is the legal effect of a voluntary Code?**

The legal effect depends on whether it is expressed merely as a set of principles or whether it is intended to be contractually binding on a party that accepts it.

For example, the Code of Banking Practice is contractually binding between a bank and its customers once it is adopted by the bank. The intention is that the Code is incorporated into the terms and conditions of the various financial services.

### **Essential elements of codes of conduct**

The ACCC's *Guidelines for developing effective voluntary industry codes of conduct* published in February 2005 outlines the essential elements of codes of conduct:

- Objectives of the code need to reflect specific stakeholder/business concerns;
- Ensure that the framework and language is clear to all stakeholders
- Set out the rules in the code that address common complaints and concerns about industry practices
- Establish a code administration committee and its functions in the code
- Include provisions for a complaints handling scheme in accordance with AS4269
- Incorporate in the code commercially significant sanctions for breaches of the code
- Provide for an independent review mechanism for when a complainant is dissatisfied with an outcome
- Incorporate mechanisms in the code that ensure consumer awareness
- Incorporate mechanisms in the code that ensure industry awareness
- Include provisions for relevant data collection
- Specify a regular review process of the code
- Avoid anti-competitive implications in the code
- If anti-competitive implications are unavoidable seek ACCC authorisation
- Incorporate performance indicators in the code

### **Distinction between authorisation and endorsement**

ACCC has the power to authorize anti-competitive implications in a code eg exclusive dealing, except where it involves misuse of market power.

Separately, the ACCC has the power to endorse codes. This function tries to assist industries to go well beyond a legal compliance with the Act and to create an industry with best practice.

While the ACCC considers the likely public benefit and detriment of a code when considering an application for authorisation, this decision has no bearing

on whether or not the ACCC would endorse a Code. The authorisation process as set out in the Trade Practices Act only indicates that a code passes a certain legal test. Authorisation does not indicate that a code is best practice; authorisation is not an endorsement or approval of a code by the ACCC.

### **Case study: What are the Codes that affect financial services?**

It's worth listing the codes that apply just to the provision of financial services so that you can appreciate the number of codes introduced since the early 1990's.

I have not included in the list the Consumer Credit Code because in fact, the Consumer Credit Code is annexed to an Act of Parliament and is legally enforceable. It is not a Code of Conduct. The Code of Banking Practice ("CBP") and the EFT Code are both entirely self regulatory codes although with external monitoring.

- The CBP (1993 version and its equivalent Credit Union and Building Society Codes) and the CBP 2003 version (not adopted by all banks) currently apply to home loans, personal loans, margin lending, mortgages, guarantees, cheques, non-cash payment facilities and credit cards. The 2003 Code applies to both individuals and small business customers of subscribing banks. It also applies to people from whom the bank obtains, or proposes to obtain, a guarantee. The 1993 Code does not apply to small business customers or to guarantors of some business loans ;
- EFT Code of Conduct (new version commenced 1 April 2002) applies to credit cards and non-cash payment facilities such as direct debit, ATM, EFTPOS, Internet banking, telephone/IVR banking, BPAY;
- Privacy Credit Reporting Code of Conduct and personal information privacy codes;
- Centrelink Code of Operation with Participating Financial Institutions;
- Advertising Code;
- General Insurance Code of Practice;
- General Insurance Brokers Code of Practice;
- Financial Planners Code of Ethics and Rules of Professional Conduct;
- Internet Code of Conduct;
- Direct Marketing Code;
- Banks and Small Business Working Together: A Set of Principles.

### **ASIC's role**

ASIC Policy Statement *Approval of financial services sector codes of conduct* [PS 183] issued in February 2005, sets out how ASIC will approve codes in accordance with s1101A of the Corporations Act 2001. This is a statutory power to approve voluntary industry codes of conduct.

ASIC does not have the power to require industry codes. Industry must decide in the first instance whether to develop a code, and then whether to have that code approved by ASIC.

What does ASIC consider to be a code? In ASIC's view, there is an important distinction between industry codes and other self-regulatory arrangements. It considers that effective codes should deliver stronger consumer protection outcomes because:

- (a) they are enforceable;
- (b) they are developed in a consultative fashion so as to address a broad range of issues of real concern to consumers;
- (c) they set standards that elaborate on, exceed or clarify the law;
- (d) compliance with their standards is required to be monitored; and
- (e) remedies and sanctions are available for breaches of the code.

### **Coping with codes**

The difficulty for businesses is that in some cases regulation is inconsistent or overlapping or difficult to interpret. You are confronted by both law and codes. They are constantly being reviewed.

Whether your obligation is contained in a law or code, you still need to create computer programs and develop instruction manuals and staff training programs in order to comply with these obligations.

When a code reflects best practice, it can lead to competitive advantage.

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