

**Australian eMarketing Code of Practice**  
**March 2005**

## **Explanatory Statement**

This is the Explanatory Statement for the Australian eMarketing Code of Practice (the Code).

This explanatory statement explains the purpose of the Code and describes the context in which it has been developed.

### **BACKGROUND**

The Australian Government has acted to combat the increasing problem of spam by passing the *Spam Act 2003*. The Act came into effect on 10 April 2004 and prohibits the sending of unsolicited commercial electronic messages with an Australian link. Electronic messages are defined by the Act to include messages sent by e-mail, instant messaging and Short Message Service (SMS) and Multimedia Message Service (MMS). The Act requires that all commercial electronic messages are sent with the express or inferred consent of the recipient, and that they include accurate information about who authorised the sending of the message and a functional unsubscribe facility. The Act also prohibits the supply, acquisition or use of address-harvesting software for the purpose of sending unsolicited commercial electronic messages.

The obligations outlined in the *Spam Act 2003* are general in nature and apply to all organisations and individuals without distinction. As a result, the Act does not provide specific guidance to participants in the eMarketing industry involved in email or mobile marketing, on how current industry practice should be amended to ensure compliance with the Act.

Therefore the eMarketing Code of Practice has been developed to establish comprehensive industry rules and guidelines for the sending of commercial electronic messages with an Australian link in compliance with the *Spam Act 2003*. The Code has been developed under Section 112(1A) of the *Telecommunications Act 1997*. This provision recognises the intention of the Commonwealth Parliament that industry bodies or associations representing sections of the eMarketing industry should develop industry codes of practice that apply to the industry sector in relation to the e-marketing activities of the participants. The Act requires that the industry bodies or associations developing the Code must be representative of the eMarketing industry to the satisfaction of the Australian Communications Authority (ACA).

A Committee comprising representatives from peak industry associations, consumer groups, message service providers, government regulatory agencies and corporate business (a full list of participants is listed at page 10), developed the Code. The Committee was chaired by the Chief Executive Officer of the Australian Direct Marketing Association and was representative of the eMarketing industry from both a business and consumer perspective. The eMarketing industry is defined in section 7 of the *Telecommunications Act 1997* as 'an industry that involves carrying on an e-marketing activity'.

## **HOW THE CODE BUILDS ON THE CURRENT REGULATORY ARRANGEMENTS**

The Code establishes industry-wide rules and guidelines for the sending of commercial electronic messages in accordance with the *Spam Act 2003*. The Code rules and guidelines provide practical and specific guidance in relation to the sending of messages in the context of current eMarketing practices. The Code also provides a framework by which industry can handle complaints about spam and monitor industry compliance with the Code provisions.

The Code provides detail on the following key areas relating to the sending of commercial electronic messages in an email and mobile marketing environment in Australia:

- Obtaining and maintaining consent;
- Keeping records of consent;
- Obligations in relation to viral marketing campaigns;
- Inclusion of accurate information about senders/message authorisers ;
- Provision and operation of a functional unsubscribe facility;
- Sending commercial electronic messages about age sensitive material;  
and
- Complaints handling.

The Code also delivers a higher standard of practice than required by the *Spam Act 2003*.

## **APPLICATION OF THE CODE OF PRACTICE**

The Code automatically applies to all persons, including individuals and organisations, undertaking an e-marketing activity. An '**e-marketing activity**' is defined at section 109A of the *Telecommunications Act 1997*, which states:

- (1) For the purposes of this Part, an *e-marketing activity* is an activity to which subsection (2) or (3) applies.
- (2) This subsection applies to an activity that:
  - (a) is carried on by a person (the *first person*) under a contract or arrangement (other than a contract of employment); and
  - (b) consists of:
    - (i) using commercial electronic messages to market, advertise or promote goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or
    - (ii) using commercial electronic messages to advertise or promote a supplier or prospective supplier of goods or services, where the first person is not the supplier or prospective supplier of the goods or services; or

- (iii) using commercial electronic messages to market, advertise or promote land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
  - (iv) using commercial electronic messages to advertise or promote a supplier or prospective supplier of land or interests in land, where the first person is not the supplier or prospective supplier of the land or interests in land; or
  - (v) using commercial electronic messages to market, advertise or promote business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities; or
  - (vi) using commercial electronic messages to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the first person is not the provider or prospective provider of the business opportunities or investment opportunities.
- (3) This subsection applies to an activity carried on by a person if:
- (a) the activity consists of using commercial electronic messages to market, advertise or promote goods or services; and
  - (b) the person is the supplier or prospective supplier of the goods or services; and
  - (c) the activity is the sole or principal means of marketing, advertising or promoting the goods or services.
- (4) An expression used in this section and in section 6 of the *Spam Act 2003* has the same meaning in this section as it has in that section.

In summary, the Code automatically applies to the following activities (whether an eMarketing industry member is a signatory or not) and to the extent to which entities engage in these activities, they are bound by the provisions of this Code in respect to these activities:

- Activities undertaken by individuals or organisations to market, promote or advertise their own goods and services where sending or causing to send commercial electronic communications is their **sole or principal means** of marketing, promoting or advertising their own goods or services.
- Activities undertaken by individuals or organisations who by contract or other arrangement with a person market, advertise or promote the goods or services (including land and interests in land and business and investment opportunities) of that person by sending commercial electronic communications or causing them to be sent.

- Activities undertaken by individuals or organisations who by contract or other arrangement with a person market, advertise or promote that person as a supplier, prospective supplier, provider or prospective provider of goods or services (including land and interests in land and business and investment opportunities) by sending commercial electronic communications or causing them to be sent.

Note that the definition of 'use' of commercial electronic messages includes sending commercial electronic messages or causing them to be sent, for example by engaging a third party to send. To clarify, this does not include merely supplying the underlying carriage service or web-based facility for the storage, transmission or delivery of a message where the persons supplying the carriage service or web-based facility have no control over the content of any messages stored.

The Code does not apply to the actions of individuals or organisations involved in the sending of commercial electronic messages who are not engaged in eMarketing activities as described above. However, such entities remain subject to the *Spam Act 2003* and may choose to use the Code provisions as a best practice approach to compliance.

## **CODE ENFORCEMENT**

The *Telecommunications Act 1997* provides the ACA with powers to investigate complaints, issue warnings to comply and direct compliance with registered codes of practice (whether the industry member is a signatory to the Code or not). A failure to comply with a direction issued by the ACA can result in court action and the imposition of pecuniary penalties. Part 6 of the Act allows for the development of self-regulatory industry codes which amongst other benefits, provide an opportunity for industry to actively manage complaints and monitor its own compliance with codes.

In enforcing the provisions of this Code, the Code employs the greatest practicable use of industry self-regulation whilst acknowledging the ACA's powers as an important backup. The Code provides for industry to actively resolve and monitor complaints where appropriate. Where complaints are not satisfactorily resolved or breaches of the Code arise the ACA may pursue enforcement action.

## **CODE OBJECTIVES**

The objectives of the Code are to:

- reduce the incidence of unsolicited commercial electronic messages received by consumers;
- provide a plain English application of the provisions of the *Spam Act 2003* to current eMarketing practices; and
- promote best practice use of commercial electronic messaging in compliance with the *Spam Act 2003*.

## **HOW WILL THOSE OBJECTIVES BE ACHIEVED**

The objectives of the Code will be achieved by:

- the establishment of clear, unambiguous rules and guidelines for the sending of commercial electronic messages;
- the application of these rules and guidelines to current marketing practices by members of the eMarketing industry; and
- enforcement by the ACA when necessary.

Data on complaints (collected by industry and the ACA) can be used by the Code administration body and the ACA as an indicator of industry's compliance with the Code.

## **CODE BENEFITS**

### ***Anticipated benefits to consumers***

The anticipated benefits to consumers from industry compliance with the Code include:

- An expectation of appropriate industry behaviour in relation to the sending of commercial electronic messages and the gaining of consent;
- A reduction in the incidence of unsolicited commercial messages sent by members of the Australian eMarketing industry;
- A clear understanding of the eMarketing industry's processes and benchmarks in respect of commercial electronic messages;
- A clear and comprehensive identification of the senders and/or authorisers of commercial electronic messages;
- Clear and transparent means of unsubscribing to and withdrawing consent to receive future messages;
- An efficient and fair method of having complaints handled by the eMarketing industry.

### ***Anticipated benefits to industry***

Compliance with the Code should result in the reduction of complaints made to members of the eMarketing industry. The existence of the Code will give the public greater confidence of the eMarketing industry's compliance with the *Spam Act 2003* and its ability to self-regulate on this issue.

Compliance with the Code will provide industry with confidence in its own compliance with the *Spam Act 2003*.

### ***Anticipated costs to industry***

It is anticipated that industry participants will incur some initial and ongoing costs in relation to complying with the Code. It should be noted that industry will already have incurred some costs in altering practices to comply with the *Spam Act 2003*. As the Code is likely to result in improved relationships with customers, it is likely to result in better outcomes for industry in the long run.

***Other public interest benefits or considerations***

Although the Code is applicable to and may only be enforced in relation to defined eMarketing activities there is scope for its principles, rules and guidelines to be adopted by all senders of commercial electronic messages to assist in compliance with the *Spam Act 2003*, resulting in a wider adoption of better practices.

**CODE STATUS**

This Code has been registered by the ACA pursuant to section 117 of the *Telecommunications Act 1997*.

## List of Participants

The group that developed this Code consisted of the following organisations and their representatives:

<b>Representative</b>	<b>Organisation</b>
Robert Edwards (Chair)	Australian Direct Marketing Association
Jodie Sangster	Australian Direct Marketing Association
Chad Gates	Australian Retailers' Association
Charles Britton	Australian Consumers' Association
Chris Thomas / Jenny Williams	Advertising Federation of Australia
Peter Coroneos	Internet Industry Association
Ewan Brown	Small Enterprise Telecommunications Centre
Gordon Cramer	Actif Communications
Val Smirnios	Legion Interactive
Adam Benson	Public Relations Institute of Australia
David Hinitt	Australian Competition and Consumer Commission
Ian Crute	Qantas
Anna Snidaro	Australian Communications Authority (observer and secretariat services only)

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## A. FOREWORD

Section 112(1A) of the *Telecommunications Act 1997* sets out the intention of the Commonwealth Parliament that bodies or associations that the ACA is satisfied represent sections of the eMarketing industry should develop industry codes that are to apply to participants in the respective sections of the industry in relation to the eMarketing activities of those participants.

This Code has been developed by a committee of representatives of peak bodies representing the participants of the eMarketing industry, a number of Message Service Providers, government regulatory agencies and representatives of corporate business.

This Code covers industry rules for the sending of commercial electronic messages in compliance with the *Spam Act 2003*.

The Code should be read in conjunction with related legislation, including:

- *The Spam Act 2003*;
- *The Telecommunications Act 1997*; and
- *The Privacy Act 1988*.

If there is a conflict between the requirements of this Code and any legislative requirements placed on a member of industry, the industry member will not be in breach of this Code by complying with the legislative requirements.

Industry members marketing outside of Australia should be aware of, and take account of, the national laws and codes of practice of the country in which the recipient is resident.

The Guidelines and Examples provided in Sections F and G of the Code are a guide to interpretation only and are not binding as Code Rules.

This Code has been registered with the Australian Communications Authority pursuant to section 117 of the *Telecommunications Act 1997*.

## B. SCOPE, APPLICATION AND OBJECTIVES

### 1. Scope

- 1.1 This Code sets out conditions for sending commercial electronic messages with an Australian Link, including those sent by email, instant messaging and Mobile Wireless Technology (MWT). These messages are referred to throughout the Code as 'Commercial Communications'.
- 1.2 The Code applies to all persons who undertake or intend to undertake an e-marketing activity as defined in section 109A of the *Telecommunications Act 1997*. This definition covers the following activities:
- 1.2.1 Activities where a person uses Commercial Communications to market, advertise or promote goods or services; where
- (a) the person is the supplier or prospective supplier of the goods or services; and
  - (b) the activity is the **sole or principal means** of marketing, advertising or promoting the goods or services (**See Section F, Guideline 1**).
- 1.2.2 Persons undertaking the activity described in subclause 1.2.1 are taken to be 'Message Originators' for the purposes of this Code.
- 1.2.3 Activities undertaken by a person under a contract or arrangement (other than a contract of employment) which are:

- a) using Commercial Communications to market, advertise or promote goods or services, where the person is not the supplier or prospective supplier of the goods or services; or
- b) using Commercial Communications to advertise or promote a supplier or prospective supplier of goods or services, where the person is not the supplier or prospective supplier of the goods or services; or
- c) using Commercial Communications to market, advertise or promote land or interests in land, where the person is not the supplier or prospective supplier of the land or interests in land; or
- d) using Commercial Communications to advertise or promote a supplier or prospective supplier of land or interests in land, where the person is not the supplier or prospective supplier of the land or interests in land; or
- e) using Commercial Communications to market, advertise or promote business opportunities or investment opportunities, where the person is not the provider or prospective provider of the business opportunities or investment opportunities; or

- f) using Commercial Communications to advertise or promote a provider, or prospective provider, of business opportunities or investment opportunities, where the person is not the provider or prospective provider of the business opportunities or investment opportunities.

1.3 Persons undertaking the activities described in subclauses 1.2.3 (a) – (f) are taken to be ‘Message Service Providers’ for the purposes of this Code.

1.4 The term ‘Use’ in respect of Commercial Communications when referenced in this Code, includes to send or cause to be sent (for example by contracting another party to send the Commercial Communication).

1.5 This Code applies to all sections of the eMarketing industry. Section 110A of the *Telecommunications Act 1997* states that all of the persons carrying on, or proposing to carry on e-marketing activities constitute the eMarketing industry.

1.6 The following activities are covered by the provisions of this Code and to the extent to which entities engage in these activities, they are bound by the provisions of this Code in respect to these activities:

1.6.1 Activities undertaken by advertising companies who are contracted by a person to market, to advertise or promote the goods or services of that person by sending Commercial Communications or causing them to be sent (for example by engaging a Message Service Provider to send a Commercial Communication developed by the advertising company);

- 1.6.2 Activities undertaken by Public Relations firms who are contracted by third parties to send Commercial Communications or cause them to be sent to advertise or promote goods or services of a third party; and
- 1.6.3 Activities undertaken by individuals or Organisations to market, promote or advertise their own goods and services where sending or causing to send Commercial Communications is their sole or principal means of marketing, promoting or advertising their own products or services.
- 1.7 Registration of this Code by the ACA allows the ACA to enforce the provisions of this Code against all persons undertaking an e-marketing activity regardless of whether they are a signatory to this Code.
- 1.8 The following activities are not considered to be e-marketing activities and to the extent that entities engage in these activities they are not bound by the provisions of this Code in respect to these activities:
  - 1.8.1 Merely supplying the underlying carriage service or web-based facility for the storage, transmission or delivery of a message where the persons supplying the carriage service, web-based facility or electronic messaging service have no control over the content of any messages stored, transmitted or delivered;
  - 1.8.2 Merely supplying a data storage and management service for storing and managing data such as mailing lists where the persons supplying the service do not send Commercial Communications from the service; and

1.8.3 Activities consisting of using Commercial Communications to market, advertise and promote goods or services, where the person undertaking the activities is the supplier or prospective supplier of the goods and services and the activities are not their sole or principal means of marketing, promoting or advertising their own products or services.

1.9 Persons undertaking the activities referred to in clause 1.8 may utilise the 'best practice' provisions of this Code to supplement their compliance with the provisions of the *Spam Act 2003*.

## **2. Territorial application**

2.1 This Code applies to the activities of Message Service Providers and Message Originators only to the extent their Commercial Communications have an Australian Link.

## **3. Objectives**

3.1 The principle objective of this Code is to ensure that Australian electronic account holders do not receive unsolicited Commercial Communications from the following sources:

- E-mail;
- Instant-Messaging; and
- A Mobile Wireless Technology.

3.2 The Code's objectives are to:

- provide a plain English application of the provisions of the *Spam Act 2003*; and
- promote best practice use of Commercial Communications in compliance with the *Spam Act 2003*.

## C. DEFINITIONS AND ABBREVIATIONS

ACA	The Australian Communications Authority—the government regulator of telecommunications and radiocommunications.
Australian Link	In respect of Commercial Communications means: <ul style="list-style-type: none"><li>o originating, commissioned or authorised in Australia and sent to any destination;</li><li>o originating, commissioned or authorised overseas and sent to an address accessed in Australia.</li></ul>
Charity	A Charity or charitable institution is a not-for-profit Organisation with a dominant charitable purpose for the public benefit.
Code	This Code of Practice
Code Administration Body	A body comprised the representatives outlined in Section E of the Code and whose functions are determined by clause 2.
Commercial Communication	The communication of advertising, marketing or promotional material, which is directed to a Recipient via an Electronic Message.
Complaint	In respect of this Code – a Complaint is an expression of dissatisfaction relating to actions taken by a Message Originator or Message Service Provider under this Code and lodged in writing (including electronically) in accordance with the procedures outlined in this Code.

Confirmed Opt-In	A process whereby on receipt of a subscription the Message Originator or Message Service Provider acknowledges the subscription by sending an email to the new subscriber.
Consent	Means: <ul style="list-style-type: none"> <li>i. Express Consent; or</li> <li>ii. Inferred Consent.</li> </ul>
Contact Mechanism	A means which allows the Recipient or Relevant Electronic Account Authority to make direct contact with, or obtain information from a Message Originator, or Message Service Provider including, but not limited to a postal address, telephone number, website, email address, WAP site or bookmark, or nominated MWT reply number.
Data Provider	A person or company that makes Third Party Contact information available to Message Originators or Message Service Providers for the purpose of allowing the Third Party Contact information to be used to send Commercial Communications. A Data Provider may or may not be actively involved in the sending of Commercial Communications.
Device	The apparatus or hardware on which a Commercial Communication is received by the Recipient for example, computer or mobile phone.
Double Opt-In	The process whereby the Recipient or Relevant Electronic Account Authority takes an active step to confirm that Express Consent has been given.

Educational Institution	A pre-school, school, college or university and includes private schools, colleges and universities.
Electronic Address	An Electronic Address includes but is not limited to: <ul style="list-style-type: none"> <li>i. An email address;</li> <li>ii. An Electronic Address in connection with an instant messaging service;</li> <li>iii. A telephone number.</li> </ul>
Electronic Message	A message sent using an internet or other listed carriage service to an Electronic Address in connection with: <ul style="list-style-type: none"> <li>i. An email account;</li> <li>ii. An instant messaging account;</li> <li>iii. A telephone account;</li> <li>iv. A similar account;</li> </ul> excluding voice telephony and facsimile.
Express Consent	An active step taken by a Recipient or Relevant Electronic Account Authority to indicate Consent.
Factual Communication	An electronic communication the purpose of which is to merely notify or inform the Recipient or Relevant Electronic Account Authority and not to influence the Recipient or Relevant Electronic Account Authority in making a purchasing decision about a product or service or to inspire a commercial relationship.
Forwarding Facility	A mechanism provided on a commercial website or within the body of an Electronic Message that generates a predefined Commercial Communication to be sent/forwarded to another Recipient's Electronic Address specified by a Recipient.

Functional Unsubscribe Facility	An effective facility, which may or may not be automated, that allows an electronic account holder to withdraw Consent by indicating to the Message Originator or Message Service Provider that such Commercial Communications must not be sent in the future.
Government Body	<p>Means:</p> <ul style="list-style-type: none"> <li>i. a department of the Commonwealth, a State or a Territory; or</li> <li>ii. an agency, authority or instrumentality of the Commonwealth, a State or a Territory; or</li> <li>iii. a department of the government of a foreign country; or</li> <li>iv. an agency, authority or instrumentality of a foreign country; or</li> <li>v. a department of the government of a part of a foreign country; or</li> <li>vi. an agency, authority or instrumentality of the government of a part of a foreign country.</li> </ul>
Inferred Consent	<p>Consent that can be reasonably inferred from the conduct; and business relationships; and other relationships.</p>
Location Based Commercial Communications	<p>of the Recipient or Relevant Electronic Account Authority.</p> <p>Commercial Communications targeted to a Recipient or Relevant Electronic Account Authority dependent on their location as determined by technology such as Global Positioning Systems (GPS).</p>

Media Representative	A Recipient directly involved in the collection, analysis and reporting of public events, information or published content. This includes, but is not limited to, editors, subeditors, journalists, researchers, producers, executive producers, directors, writers and presenters.
Message Authoriser	Any individual or Organisation (including sole traders and partnerships) that authorises and may also send or cause to be sent Commercial Communications to promote, advertise or offer to supply its own products or services, where the Use of Commercial Communications is NOT the sole or principal means of promoting, advertising or offering to supply its own products or services. Message Authorisers are not bound by the provisions of this Code but are required to comply with the <i>Spam Act 2003</i> .
Message Originator	Has the meaning given to it in section B, subclause 1.2.2 and includes any individual or Organisation (including sole traders and partnerships) that sends or causes to be sent and authorises the sending of Commercial Communications to promote, advertise or offer to supply its own products or services, where the Use of Commercial Communications <u>is</u> the sole or principal means of promoting, advertising or offering to supply its own products and services.
Message Service Provider	Has the meaning given to it in section B, subclause 1.2.3 and includes any individual or Organisation (including sole traders and partnerships) which, by contract or other arrangement (other than a contract of employment) sends or causes to be a sent a Commercial Communication on behalf of a Message Originator or Message Authoriser.

Mobile Wireless Technology (MWT)	Includes existing and emerging wireless technologies including but not limited to Short Message Service (SMS), Multimedia Message Service (MMS), Wireless Access Protocol (WAP) and 3 <sup>rd</sup> Generation technology (3G). It does not include voice calls made to mobile telephones.
Organisation	Includes sole traders, partnerships and bodies corporate, Government Bodies and unincorporated bodies or associations.
Paid Subscription Service	A Commercial Communication or series of Commercial Communications supplied and paid for over a defined period of time.
Premium Rate Service	A MWT service charged at a premium to the normally accepted standard rate for that means of communications.
Recipient	Any natural person who receives or may receive a Commercial Communication.
Recognised Industry Body	A body or association having a membership representing Message Originators and/or Message Service Providers that has been accredited by the ACA to investigate Complaints received under the Code.
Registered Political Party	A political party, or a branch or division of a political party, that is registered under: <ul style="list-style-type: none"> <li>i. the <i>Commonwealth Electoral Act 1918</i>; or</li> <li>ii. a law of a State or Territory that deals with electoral matters.</li> </ul>

Relevant Electronic Account Authority	<p>A person or Organisation or who has direct administrative or financial authority to amend, cancel or suspend:</p> <ul style="list-style-type: none"> <li>i. a free account; or</li> <li>ii. a pre-paid account; or</li> <li>iii. anything that may reasonably be regarded as the equivalent of an account;</li> </ul> <p>on their own or on their employees' behalf.</p>
Third Party Contact	<p>Contact information provided to a Message Originator or Message Service Provider by a third party (being someone other than the Recipient to whom the information relates), including but not limited to, referrals and swapped, rented or purchased lists.</p>
Unsolicited Commercial Communications	<p>Commercial Communications sent to Recipients or Relevant Electronic Account Authorities without Consent.</p>
Unsubscribe	<p>A request made by a Recipient or Relevant Electronic Account Authority that a Message Originator or Message Authoriser cease sending Commercial Communications of the nature specified by the Recipient.</p>
Use	<p>The term 'Use' in respect of Commercial Communications when referenced in this Code, includes to send or cause to be sent (for example by arranging for another party to send the Commercial Communication).</p>

## **D. CODE RULES**

### **1. Factual Communications**

- 1.1 Factual Communications are not Commercial Communications (**See Section G, Example 1**).
- 1.2 Other than purely factual information, a Factual Communication may only include all or any of the following information:
  - 1.2.1 Comment directly related to the factual information;
  - 1.2.2 Name, logo and contact details of the Message Authoriser or Message Originator;
  - 1.2.3 The name and contact details of the author;
  - 1.2.4 The name, logo and contact details of the author's employer (if applicable);
  - 1.2.5 If the author of the Factual Communication is a partner in a partnership – the name, logo and contact details of the partnership;
  - 1.2.6 If the author of the Factual Communication is a director or officer of an Organisation the name, logo and contact details of the Organisation;
  - 1.2.7 If the message is sponsored, the name, logo and contact details of the sponsor;
  - 1.2.8 If desired, a Functional Unsubscribe Facility.

## 2. Sending Commercial Communications

- 2.1 Message Originators must ensure they do not send, cause to be sent or authorise the sending of Unsolicited Commercial Communications.
- 2.2 Message Service Providers must ensure that they do not send or cause Unsolicited Commercial Communications to be sent.
- 2.3 Message Originators and Message Service Providers may send, authorise the sending or cause the sending of Commercial Communications to Recipients or Relevant Electronic Account Authorities providing that:
  - 2.3.1 the Recipient has provided Express Consent to receive such Commercial Communications (**See Section G, Example 2**); or
  - 2.3.2 It can be reasonably Inferred through conduct of the Recipient that the Recipient has Consented to receive such Commercial Communications (Inferred Consent); or
  - 2.3.3 It can be reasonably Inferred through the business and other relationships of the Recipient that the Recipient has Consented to receive such Commercial Communications (Inferred Consent); or
  - 2.3.4 the Relevant Electronic Account Authority has provided Express Consent on behalf of the Recipient to receive such Commercial Communications (**See Section F, Guideline 2**); or

2.3.5 It can be reasonably Inferred through the conduct of the Relevant Electronic Account Authority that they Consent on behalf of the Recipient to receive such Commercial Communications (Inferred Consent). (**See Section F, Guideline 2**).

2.4 Inferred Consent as provided for in subclause 2.3.2, 2.3.3 or 2.3.5 will be deemed to exist if the Message Originator can show that:

2.4.1 the Recipient or Relevant Electronic Account Authority has an existing and continuing relationship with the Message Originator or Message Authoriser, as an identified:

- customer;
- account holder;
- subscriber;
- member;
- licensee;
- registered user;
- employee; or
- contractor;

and would have a reasonable expectation of receiving such Commercial Communications; or

2.4.2 there is no ongoing relationship however there is the potential for one and by their conduct the Recipient or Relevant Electronic Account Authority has taken an active step to provide their contact information and has not withdrawn Consent within the last two years with the reasonable expectation that they may receive Commercial Communications (**See Section F, Guideline 3 & 4 and Section G, Example 4**) ; or

- 2.4.3 the Recipient's work-related Electronic Address has been conspicuously published in the public domain in circumstances where the job function or position of the Recipient is readily apparent (**See Section F, Guideline 5**); and
- a. the Commercial Communication is being sent to the Recipient in their business or Organisational capacity; and
  - b. the Commercial Communication relates to the business/Organisational functions or duties of the Recipient; and
  - c. the Recipient, or Organisation in which the Recipient holds a job or position has not specifically indicated within the publication that they do not wish to receive Commercial Communications (or has not provided notice of its refusal or withdrawal of Consent to Commercial Communications being sent to the Recipient's Electronic Address).
- 2.5 The process that Message Originators and Message Service Providers employ to gain Consent from the Recipient or Relevant Electronic Account Authority must be clear and transparent (**See Section F, Guideline 6**).
- 2.6 Where at any time a Recipient or Relevant Electronic Account Authority has expressly notified the Message Authoriser, Message Originator or Message Service Provider that Consent is withdrawn or denied, the Message Originator or Message Service Provider must not rely on circumstances which might otherwise be considered Inferred Consent to send a Commercial Communication (**See Section G, Example 3**).

2.7 Clauses 2.1 and 2.2 do not apply to Charities, Religious Organisations, Government Bodies and Registered Political Parties when sending Commercial Communications that relate to their own products or services or Commercial Communications sent on behalf of these entities. It also does not apply to Educational Institutions that are contacting the households of current or former students about the institution's own goods and services.

### **3. Record of Consent**

3.1 Where a Complaint has been lodged with the ACA or a Recognised Industry Body in accordance with clause 12, Section D of this Code, the onus is on Message Originators to demonstrate with sufficient evidence that Consent has been obtained (**See Section F, Guideline 7**).

3.2 In the same circumstance, where Message Service Providers are sending Commercial Communications on behalf of a Message Originator or Message Authoriser, they should be able to nominate the a Message Originator or Message Authoriser who obtained the Consent.

### **4. Third Party Contacts**

4.1 Message Originators must only send or cause to be sent Commercial Communications to Third Party Contacts, including Recipients listed on a swapped, rented or purchased list, where:

4.1.1 all reasonable steps have been taken to confirm that the Data Provider has:

- a. obtained Express or Inferred Consent from the Recipient or Relevant Electronic Account Authority to disclose their details to a third party Message Originator or Message Service Provider (**See Section F, Guideline 8**); and
- b. obtained Express Consent from the Recipient or Relevant Electronic Account Authority for their details to be used by a third party Message Originator or Message Service Provider to send Commercial Communications. (**See Section F, Guideline 8**).

4.2 Message Originators and Message Service Providers must provide sufficient information to the Recipient or Relevant Electronic Account Authority so that they know that their details will be disclosed and used by a third party Message Service Provider.

4.3 The Message Originator or Message Service Provider must ensure that Recipients or Relevant Electronic Account Authorities that have, at any time, directly informed the Message Originator, Message Authoriser or Message Service Provider that they have denied or withdrawn Consent are removed from the contact list.

4.4 Clause 4.1 does not apply where the Third Party Contact details have been collected in the manner outlined in subclause 2.4.3 above.

## **5. Hours of Contact for MWT Commercial Communications**

- 5.1 Message Originators and Message Service Providers must take all reasonable steps to ensure Recipients or Relevant Electronic Account Authorities do not receive MWT Commercial Communications between the hours of 9pm and 8am Monday to Friday and 9pm to 9am on weekends, unless the Recipient or Relevant Electronic Account Authority has expressly invited delivery within these hours or been notified in advance that this will be the case.
- 5.2 Message Originators and Message Service Providers that directly target Commercial Communications to Recipients resident outside of Australia must take all reasonable steps to ensure Recipients do not receive MWT Commercial Communications between the hours of 9pm and 8am Monday to Friday taking into account the time zone of the State or country into which the message is being sent.

## **6. Viral Marketing and Member-Get-Member Schemes**

- 6.1 Message Originators and Message Service Providers must ensure that Commercial Communications that include a Forwarding Facility contain a clear recommendation that the Recipient should only forward the Commercial Communication to persons with whom they have a relationship, where that relationship means that person could be said to have Consented to receiving Commercial Communications.
- 6.2 Where the Commercial Communication is forwarded via the Message Originator's or Message Service Provider's Forwarding Facility, the Message Originator or Message Service Provider must:

- 6.2.1 ensure that it is made clear to the end Recipient on receipt of the forwarded Commercial Communication, that the communication has been authorised and sent by the initial Recipient who is clearly identified within the communication;
  - 6.2.2 ensure that the end Recipient can easily reply to the initial Recipient who forwarded the message to them;
  - 6.2.3 not collect any data or contact details relating to the end Recipient until such times as the end Recipient personally provides such information to the Message Originator, Message Authoriser or Message Service Provider;
  - 6.2.4 ensure the initial Recipient is made aware of the content of any Commercial Communication generated by the Forwarding Facility that will be included in the message sent to the end Recipient; and
  - 6.2.5 ensure that the forwarded Commercial Communication includes information explaining how the end Recipient can Unsubscribe from receiving further Commercial Communications from the initial Recipient.
- 6.3 Where an end Recipient's contact details are provided to the Message Originator or Message Service Provider by a third party, such as a customer, the referred details will be considered a Third Party Contact for the purposes of the Code and the Message Originator or Message Service Provider must comply with clause 4 above.

## **7. Contact Information in Commercial Communications**

7.1 Message Originators and Message Service Providers must ensure that any Commercial Communications they send contain the following:

7.1.1 information identifying the Message Originator or Message Authoriser in such a way that they can be easily recognised and contacted by the Recipient. The information must remain valid for 30 days after the Commercial Communication is sent;

7.1.2 details of an appropriate Contact Mechanism that allows the Recipient or Relevant Electronic Account Authority to obtain all the following information relating to the Message Originator or Message Authoriser:

- a. full Organisation name;
- b. registered or legal address (PO Box address is not permitted, a virtual office is not permitted);
- c. ABN;
- d. postal address;
- e. email address or a method to send an Electronic Message (such as a web-based form);
- f. fixed line telephone number;
- g. contact details to which enquires or Complaints should be directed.

7.1.3 Message Originators and Message Service Providers must ensure that the Contact Mechanism provided in subclause 7.1.2 above is provided at low cost and is easy for the Recipient or Relevant Electronic Account Authority to use.

- 7.1.4 Where use of the Contact Mechanism is charged at a rate that exceeds the standard rate for that Contact Mechanism, the Message Originator must provide the Recipient or Relevant Electronic Account Authority an alternative Contact Mechanism that does not exceed the standard rate for that mechanism.  
**(See Section F, Guideline 9).**

## **8. Paid Subscription Services**

- 8.1 Express Consent of the Recipient or Relevant Electronic Account Authority must be obtained by the Message Originator before supplying Paid Subscription Services.
- 8.2 The Message Originator must obtain further Express Consent from the Recipient or Relevant Electronic Account Authority prior to supplying additional or separate Paid Subscription Services at a subsequent date.
- 8.3 Where a Recipient or Relevant Electronic Account Authority Unsubscribes from a Paid Subscription Service in accordance with clause 10, the Message Originator or Message Service Provider must inform the Recipient or Relevant Electronic Account Authority, where applicable:
- 8.3.1 of the term and nature of the agreement entered into by the Recipient or Relevant Electronic Account Authority;
  - 8.3.2 of the remaining term of the agreement and the Recipient's obligations in relation to the contract, including the remaining amount the Recipient must pay under the existing contract;

- 8.3.3 whether Unsubscribing to the services amounts to cancellation of the contract and whether payment will still be required; and
  - 8.3.4 whether the Recipient is able to resubscribe once the request to Unsubscribe has been actioned/ processed.
- 8.4 Where a Recipient or Relevant Electronic Account Authority notifies the Message Originator or Message Authoriser that they wish to Unsubscribe from a Paid Subscription Service, the Message Originator or Message Service Provider must provide the Recipient or Relevant Electronic Account Authority an opportunity to confirm their Unsubscribe request subsequent to being provided the information in clause 8.3 above. The Unsubscribe facility must comply with clause 10.

## **9. Location Based Commercial Communications**

- 9.1 Message Originators and Message Service Providers must only send Location Based Commercial Communications to Recipients or Relevant Account Authorities that have given Express Consent to the receipt of such communications in accordance with clause 2.3.1 or 2.3.4

## **10. Functional Unsubscribe Facility**

- 10.1 For each Commercial Communication, Message Originators and Message Service Providers must provide an easy-to-use, Functional Unsubscribe Facility (**See Section G, Example 5**) that:

- 10.1.1 allows the Recipient or Relevant Electronic Account Authority to opt-out of receiving further Commercial Communications sent from the Message Originator or authorised by the Message Authoriser by, at least, the same Device by which they were contacted;
  - 10.1.2 allows the Unsubscribe message to be sent to the Message Originator or Message Authoriser; and
  - 10.1.3 where necessary, complies with the requirements of Section D, clause 8.3.
- 10.2 Message Originators and Message Service Providers must clearly state to which products or services the Functional Unsubscribe Facility relates.
- 10.3 The Functional Unsubscribe Facility provided in clause 10.1 must be provided at low cost and be easy to use by the Recipient or Relevant Electronic Account Authority.
- 10.4 Where the Unsubscribe message will result in unexpected consequences such as the disconnection of multiple services, the Message Originator or Message Service Provider must state the consequences of Unsubscribing and provide a Contact Mechanism to allow the Recipient or Relevant Electronic Account Authority to obtain further information. The Contact Mechanism provided must comply with the requirements of subclauses 7.1.3 and 7.1.4.
- 10.5 Message Originators must ensure that the Functional Unsubscribe Facility remains functional for a period of 30 days after the message has been sent.

- 10.6 Where the Functional Unsubscribe Facility is charged at a rate that exceeds the standard rate for that Contact Mechanism, the Message Originator must provide the Recipient or Relevant Electronic Account Authority an alternative but equivalent Functional Unsubscribe Facility that does not exceed the standard rate for that Contact Mechanism. The alternative Unsubscribe facility must be clearly indicated at the time of obtaining Consent.
- 10.7 Message Originators sending Commercial Communications must operate and maintain an effective facility to ensure that Recipients or Relevant Electronic Account Authorities who have Unsubscribed are not sent further Commercial Communications after five days of their request being sent.
- 10.8 Where an Unsubscribe request is received by a Message Service Provider on behalf of a Message Originator or Message Authoriser, the Message Service Provider must forward the request to the Message Originator or Message Authoriser expeditiously, thereby enabling the Message Originator or Message Authoriser to fulfil its obligations under Schedule 2, clause 6 of the *Spam Act 2003* which requires that the withdrawal of Consent takes effect at the end of the period of five business days beginning on the day the Unsubscribe message was sent or delivered.
- 10.9 Message Originators and Message Service Providers must only use or disclose personal information collected and stored for the purposes of clause 10 to comply with the Recipient's or Relevant Electronic Account Authority's request to Unsubscribe and not for any other purpose unless otherwise indicated by the Recipient or Relevant Electronic Account Authority.

## **11. Sending Age-Sensitive Commercial Communications**

- 11.1 Where the content of a Commercial Communications seeks to promote or inspire interaction with a product, service or event that is age sensitive, the Message Originator must take reasonable steps to ensure that such content is sent to Recipients who are legally entitled to use or participate in the product service or event **(See Section F, Guideline 10)**.

## **12. Complaints Handling**

### ***Scope***

- 12.1 This part outlines the procedure that applies when handling Complaints **(See Section F, Guideline 11)** relating to alleged breaches of this Code.

### ***Complaint handling systems***

- 12.2 Message Originators and Message Service Providers must have in place a Complaint handling system (i.e. internal procedure for dealing with Complaints) which is fair, effective, confidential and easy to use by the complainant **(See Section F, Guideline 12)**.

- 12.3 As outlined at Section D, subclause 7.1.2 (g), Message Originators and Message Service Providers must make details of their Complaint handling process accessible within each Commercial Communication.
- 12.4 Message Originators and Message Service Providers must ensure that the Contact Mechanisms by which a complainant can lodge a Complaint are not charged at a rate that exceeds the standard rate for that Contact Mechanism.

***Record of Complaints (See Section F, Guideline 13)***

- 12.5 Message Originators and Message Service Providers handling Complaints relating to this Code must keep records of:
- 12.5.1 the name and contact details of the Recipient or Relevant Electronic Account Authority making the Complaint;
  - 12.5.2 the nature of the Complaint;
  - 12.5.3 whether the Complaint has been resolved to the satisfaction of the Recipient or Relevant Electronic Account Authority;
  - 12.5.4 the date the Complaint was lodged and the time taken to resolve the Complaint; and
  - 12.5.5 remedial action taken (where appropriate).
- 12.6 Message Originators and Message Service Providers must maintain these records in an auditable form for a period of 12 months.
- 12.7 Where requested by a Recognised Industry Body, the Message Originator or Message Service Provider must submit a summary of the number and type of Complaints (containing no personal information about the Complainant) received during the past 12 months or shorter period specified by the Recognised Industry Body.

- 12.8 Where requested by the ACA, Recognised Industry Bodies must submit a summary of information received under clause 12.7 to the ACA. The summary must not identify specific Message Originators or Message Service Providers.

***Complaints received by Message Originators and Message Service Providers***

- 12.9 Message Originators and Message Service Providers must acknowledge Complaints within five working days of their receipt.
- 12.10 When acknowledging receipt of Complaints, Message Originators and Message Service Providers must inform the complainant that the Complaint will (with the consent of the complainant) be referred to the ACA should the complainant be dissatisfied with the resolution or the process at any stage.
- 12.11 Message Originators and Message Service Providers must take appropriate action to resolve Complaints concerning any activities covered by this Code. Complaints should be resolved within 28 days of receipt of the Complaint from the complainant. Where resolution of the Complaint is expected to exceed 28 days, the Recipient or Relevant Electronic Account Authority must be informed of the likely timeframe for resolution prior to 28 days elapsing.

***Complaints received by the Australian Communications Authority***

- 12.12 Where the ACA receives a Complaint relating to an alleged breach of the Code, the ACA's policy is to provide the complainant with the option of addressing the Complaint directly with the relevant Message Originator or Message Service Provider in the first instance by the process described at clauses 12.9-12.11.

12.13 Where the complainant agrees to lodge the Complaint with the relevant Message Originator or Message Service Provider in the first instance, the ACA's policy is to inform the complainant that the Complaint (at the complainants request) can be referred back to the ACA if the complainant is not satisfied with the resolution or the process employed by the Message Originator or Message Service Provider.

12.14 Where the complainant wishes to lodge a Complaint directly with the ACA (either following or instead of action by the Message Originator or Message Service Provider), the ACA's policy is to assess the Complaint and take one of the following actions:

12.14.1 Where the Complaint:

- a. is of a serious or systemic nature; or
- b. relates to a Message Originator or Message Service Provider that is not a signatory to the Code or is a signatory to the Code and has not nominated a Recognised Industry Body of which it is a member to refer the Complaint;

the ACA's policy is to deal with the Complaint internally through the existing ACA Complaints handling procedure.

12.14.2 Where the Complaint relates to a Message Originator or Message Service Provider who is a signatory to the Code and is a member of a Recognised Industry Body which it has nominated to investigate Complaints, the ACA's policy is to refer the Complaint (with the consent of the complainant) to the Recognised Industry Body for resolution in accordance with clauses 12.16 - 12.24.

12.15 The ACA has nominated a number of Recognised Industry Bodies to investigate Complaints relating to its members. The ACA's criteria for these Bodies are outlined in the attached Schedule (See Section H). A list of Recognised Industry Bodies is available at the ACA website at [www.aca.gov.au](http://www.aca.gov.au).

***Recognised Industry Bodies – Complaint handling***

12.16 Where a Complaint has been referred to a Recognised Industry Body in accordance with subclause 12.14.2 above, the Recognised Industry Body must:

12.6.1 Write to the Message Originator or Message Service Provider within 10 days of receiving the Complaint from the ACA:

- a. outlining the grounds for Complaint and particulars of the issues raised in the Complaint or enclosing a copy of the Complaint received; and
- b. requesting a written response to the issues raised in the Complaint within 14 days.

12.17 If the Message Originator or Message Service Provider fails to provide a written response within 14 days, the Recognised Industry Body must refer the Complaint to the ACA and advise the complainant in writing that the Complaint has been referred.

- 12.18 If within 14 days the Message Originator or Message Service Provider provides clear evidence of acting in compliance with the Code, the Recognised Industry Body will take no further action and advise the complainant in writing of the reason(s) why no further action will be taken. The Recognised Industry Body will provide a copy of this advice to the ACA. The complainant must be offered the option to request that the ACA review the Complaint.
- 12.19 If within 14 days the Message Originator or Message Service Provider provides clear evidence of having independently resolved the Complaint to the satisfaction of the complainant, the Recognised Industry Body will confirm to the complainant in writing that the Complaint has been resolved. The Recognised Industry Body will provide a copy of this advice to the ACA.
- 12.20 If within 14 days the Message Originator or Message Service Provider's response indicates a breach of the Code, the Recognised Industry Body shall request that the Message Originator or Message Service Provider to submit a written undertaking to the Recognised Industry Body outlining:
- 12.20.1 the remedial action that will be taken in respect of the Complaint;
  - 12.20.2 the remedial action that will be taken to ensure that a breach of the Code provision(s) does not recur; and
  - 12.20.3 the timeframe for implementation, being no longer than 10 days.

- 12.21 The Recognised Industry Body must confirm to the ACA and the complainant that the remedial action taken in accordance with clause 12.20 above has:
- 12.21.1 been implemented within the time frame; and
  - 12.21.2 has been implemented to the satisfaction of the Recognised Industry Body.
- 12.22 Where the Message Originator or Message Service Provider fails to submit a written undertaking or does not implement the remedial action in accordance with clause 12.21 above to the satisfaction of the Recognised Industry Body, the Recognised Industry Body must (with the consent of the complainant) refer the Complaint to the ACA.
- 12.23 The Recognised Industry Body must provide the ACA with a written report relating to the Complaint within 28 days of the Complaint being referred to it by the ACA. The report must clearly outline:
- 12.23.1 the decision reached by the Recognised Industry Body and the reasons for the decision;
  - 12.23.2 the action taken by the Recognised Industry Body to resolve the Complaint;
  - 12.23.3 whether the Complaint has been resolved to the satisfaction of the complainant; and
  - 12.23.4 whether the complainant would like the ACA to review the decision.
- 12.24 The Recognised Industry Body must inform complainants of their right to refer their Complaint to the ACA.

## ***Compliance Monitoring by the ACA***

12.25 Upon registration of this Code by the ACA, it will be possible for the ACA to use its powers in relation to industry codes to warn or direct any Message Originator or Message Service Provider as defined at Section B, clauses 1.2.2 and 1.2.3 to comply with the mandatory Code rules outlined in Section D. The ACA will monitor the eMarketing industry's performance against the Code rules and may require any Message Originator or Message Service Provider whose compliance appears to be inadequate to address any process problems or difficulties.

## **E. CODE ADMINISTRATION**

### **1. Composition of Code Administration Body**

1.2 The Code Administration Body comprises representatives of the following organisations:

- Australian Direct Marketing Association
- Advertising Federation of Australia
- Australian Retailers Association
- Internet Industry Association
- Legion Interactive
- Public Relations Institute of Australia
- Qantas
- Actif Communications

1.3 The body will meet on a needs basis or at a minimum quarterly.

### **2. Role of Code Administration Body**

2.1 The Code Administration Body is responsible for the following functions:

- Ongoing administration of the Code of Practice. This includes monitoring application of the Code provisions and ensuring the provisions meet the objectives of the Code.
- Where requested by the ACA, the Code Administration Body will consider applications received by the ACA from companies or Organisations applying to become voluntary signatories to the Code of Practice.

### **3. Process for Becoming a Voluntary Signatory to the Code**

3.1 Organisations wishing to become voluntary signatories to the Code must complete an application form which will be available on the ACA's website and the websites of Recognised Industry Bodies. In its application the applicant can nominate a Recognised Industry Body, of which they are a member, to consider escalated Complaints.

3.2 The application must then be sent to the ACA for processing.

3.3 If the ACA is satisfied that the applicant:

- is undertaking an eMarketing activity; and
- has properly completed the application;

it will recognise the applicant as a voluntary signatory to the Code.

3.4 If the ACA:

- is uncertain whether an applicant is undertaking eMarketing activities; and/or
- has received a Complaint about the applicant in the last 12 months;

the ACA may request the Code Administration Body to consider the application.

3.5 The Code Administration Body may request that the applicant provide documentary evidence to demonstrate that it is undertaking eMarketing activities or to demonstrate compliance. On making a decision the Code Administration Body will inform the ACA and transfer relevant documentation.

3.6 The names of signatories to the Code will be published on the ACA's website.

### **4. Code Review**

4.1 It is recommended that this Code be reviewed in 12 months following the date of registration.

## F. GUIDELINES

### **Guideline 1: Principal Means of Marketing, Promoting or Advertising** **(See Section B, subclause 1.2.1)**

In determining whether sending or causing Commercial Communications to be sent is their 'principal' means of marketing, promoting or advertising their own goods or services, Message Originators should have regard to whether eMarketing is their first means of marketing, advertising or promoting in order of importance; or the chief, main or leading means of marketing, advertising or promoting. The projected customer reach of eMarketing campaigns compared to other forms of marketing employed is an important indicator in this regard.

The ACA has issued a policy statement outlining its interpretation of subsection 109A(3)(c) of the *Telecommunications Act 1997* which deals with the concept of an entity's sole or principal means of marketing. The policy statement is available at [www.spam.aca.gov.au](http://www.spam.aca.gov.au).

**Guideline 2: Relevant Electronic Account Authority**  
**(See Section D, subclauses 2.3.4 & 2.3.5)**

Relevant Electronic Account Authorities are permitted to provide and withdraw Consent on behalf of the Recipients within the Organisation to whom the account relates.

In instances where Consent is provided by an Organisation on behalf of its employees or members, the Message Originator, prior to relying on such Consent, should take all necessary steps to validate that the Consent has been given by an appropriate authority in the Organisation.

Despite a Relevant Electronic Account Authority in the Organisation providing Consent on behalf its employees or members, a Recipient may withdraw Consent at any time by notifying the Message Originator or Message Authoriser. The Message Originator must interpret this as overriding any previous Consent provided by the Relevant Electronic Account Authority in the Organisation.

Where an Organisation withdraws Consent for its employees or members, the Message Originator should interpret the withdrawal of Consent as overriding any previous Consent given by a person within the Organisation.

**Guideline 3: Inferred Consent and Pre-ticked Boxes**  
**(See Section D, subclause 2.4.2)**

A pre-ticked box in isolation should not be relied upon as indicating that Inferred Consent has been obtained. Information accompanying the pre-ticked box may satisfy the requirements for Inferred Consent outlined in clause 2.4.2, section D providing that a reasonable expectation has been created.

**Guideline 4: Inferred Consent and the Media**  
**(See Section D, subclause 2.4.2)**

Inferred Consent of a Media Representative to receive Commercial Communications from a public relations firm can be assumed where:

- The Media Representative has produced content of a similar topic and nature to the content of the Commercial Communication they are being sent; or
- The Media Representative has, within the past two years, engaged in correspondence specifically about relevant products or services with the public relations firm – not including requests to Unsubscribe from further Commercial Communications; or
- The Media Representative has, within the past two years, engaged in correspondence specifically about relevant products or services with a client the public relations firm currently represents – not including requests to Unsubscribe from further Commercial Communications.

**Guideline 5: Conspicuous Publication and Public Relations Contacts**  
**(See Section D, subclause 2.4.3)**

Many Media Representatives' email contact details can be found in hard-copy and electronic published media contact guides. They can also be found attached to the content they produce, for example in rolling credits at the end of television programs, in newspaper and magazines or on publishers' websites. These contact details are taken to be conspicuously published.

**Guideline 6: Ensuring the Process of Gaining Consent is Clear and Transparent**  
**(See Section D, clause 2.5)**

The process of gaining Consent will be considered clear and transparent where, after Express or Inferred Consent has been given by the Recipient or Relevant Electronic Account Authority, both the Message Originator and the Recipient or Relevant Electronic Account Authority share a common expectation regarding the Commercial Communications that will be sent and received.

In order to ensure clarity and transparency, the Message Originator or Message Service Provider may be required to verify the Consent provided by the the Recipient or Relevant Electronic Account Authority. For example, Inferred Consent may be confirmed by reminding the Recipient or Relevant Electronic Account Authority of the basis for Inferred Consent within the first communication sent.

*Confirmed Opt-In or Double Opt-In are examples of confirming Express Consent.*

For example, where a Recipient subscribes to a service online the following Confirmed Opt-In approach may be adopted: on receipt of a subscription the Message Originator or Message Service Provider acknowledges the subscription by sending an email to the new subscriber confirming the subscription.

Alternatively, the following Double Opt-In procedure may be adopted: on receiving the subscription request the Message Originator or Message Service Provider may acknowledge receipt by sending an acknowledgment email to the new subscriber. Within the acknowledgment email the Recipient is directed to confirm their subscription request by clicking on a link or responding to the email.

The Message Originator should be able to demonstrate that all necessary steps have been taken to confirm that Consent has been given by the Recipient or Relevant Electronic Account Authority. The Message Originator or Message Service Provider will need to make a judgment as to what steps are necessary.

With regard to Paid Subscription Services (See Section D, clause 8), Consent is considered confirmed where a Recipient or Relevant Electronic Account Authority pays for the services prior to supply. Where there is an intention to invoice the Recipient or Relevant Electronic Account Authority at a later date for subscription services supplied, the Message Originator or Message Service Provider should confirm Consent has been given prior to supply.

**Guideline 7: Record of Consent**  
**(See Section D, clause 3.1)**

Message Originators should endeavour to keep records that provide sufficient evidence to show that Consent was obtained from Recipient or Relevant Electronic Account Authorities should they be required to demonstrate compliance with the Code.

Organisations will need to consider the extent to which and the type of records that are kept. The depth of detail contained in the records will increase with the importance and reliance parties place on the service in question.

The following are **examples** of the type of information that could be recorded :

- The type of Consent that was obtained (for example, Inferred or Express);
- The method by which it was obtained (for example, online registration, supplied business card);
- The date when Consent was obtained; and
- Where Consent is Inferred, it may be prudent to document details of inference;
- Examples of the process through which Consent was obtained or Inferred. (For example, a sample or print out of the web from which Express Consent was obtained or to which Inferred Consent relates.)

An example of where the **type** and **date of Consent** will be relevant is where a Recipient, who has previously Consented through conspicuous publication, removes Inferred Consent by placing a notice next to the address conspicuously published. As this will not act retrospectively it is important that a Message Originator or Message Service Provider can demonstrate that they obtained Inferred Consent prior to the placing of the notice that indicates Consent being withdrawn.

Where a Message Service Provider sends Commercial Communications on behalf of a Message Authoriser, the Message Service Provider should take appropriate steps to ensure that the records they are keeping are compliant with the Code as defined above.

**Guideline 8: Confirmation of Consent –Third Party Contacts**  
**(See Section D, clause 4)**

When using Third Party Contacts, Message Originators and Message Service Providers are advised to keep records of the steps they have taken to verify that Consent of Third Party Contacts has been obtained by the Data Provider.

One of the steps that may be taken could include entering into a contract with the Data Provider under which the Data Provider undertakes only to supply data of Recipients that have given Consent for their data to be disclosed and used by third parties.

The Message Originator or Message Service Provider will need to make a judgment as to what steps are necessary in the circumstances taking in to account, for example, the relationship held with the Data Provider. For example, if an

- established relationship of trust exists between the Data Provider and the Message Originator or Message Service Provider; or
- the Data Provider and the Message Originator or Message Service Provider form part of the same corporate group;

the Message Originator or Message Service Provider may consider it reasonable to rely on the actions of the Data Provider to verify that Consent of Third Party Contacts has been obtained.

**Guideline 9: Standard Rate**  
**( See Section D, subclause 7.1.4)**

Standard rate for the purposes of this Code means that the cost of communication must not exceed:

- Postage: the price of a postage stamp of the type used for sending a standard letter within Australia;
- Voice telephony: the rate the Recipient would usually pay for a local or national call;
- Text telephony: the price the Recipient would usually pay to send a standard non-Premium Rate Service text message.

**Guideline 10: Age Sensitive Content**  
**(See Section D, clause 11.1)**

Examples of age sensitive content might be:

- An invitation to participate in a competition promoting alcoholic beverages;
- Invitations to events that are held at establishments where the minimum age of entry is 18;
- Invitations to participate in driving events;
- Messages containing pornographic content.

The degree to which a Message Originator may need to prevent Recipients receiving age sensitive content will vary dependant on the level of offence that may result. If delivering age sensitive material, the following are examples of some steps that the Message Originator may wish to take to ensure inappropriate content is not delivered:

- Ensure that Recipients whose known age is below that appropriate for the content that is being delivered are deleted from the list;
- There should be a clear and transparent statement at the top of the Commercial Communication or in the subject heading defining the appropriate age for viewing the content (for example, “this email is intended for Recipients OVER the age of 18”);
- If the message directs users to a web site containing age sensitive content, create a jump page preceding the content that asks users for their date of birth which is required to be validated prior allowing entry to the site.

If the content directs the Recipient to enter a competition, ensure that age verification is done prior to acceptance of the competition entry.

**Guideline 11: Identification of Complaints**  
**(See Section D, clause 12.1)**

A Complaint is defined by the Code as ‘an expression of dissatisfaction relating to actions taken by a Message Originator or Message Service Provider under this Code and lodged **in writing** (including electronically) by an identified Recipient or Relevant Account Authority in accordance with the procedures outlined in this Code’.

Electronic communications such as email are considered ‘in writing’ for the purposes of the Code.

In the instance that a complainant is genuinely unable to submit a Complaint in writing, the Message Originator or Message Service Provider should take all reasonable steps to assist the complainant in lodging a Complaint. For example, the Message Originator or Message Service Provider may transcribe the Complaint into writing and ask the complainant to sign a copy to formalise the Complaint.

**Guideline 12: Complaints Handling Systems**  
**(See Section D, clause 12.2)**

Message Originators and Message Service Providers internal Complaints handling systems may take account of and aim to comply with Australian Standard<sup>®</sup> - Complaints Handling 4269 - 1995.

**Guideline 13: Records of Complaints**  
**(See Section D, clause 12.5)**

Records of Complaints may be kept in manual or electronic form. The requirements outlined in subclauses 12.5.1 and 12.5.2 can be satisfied by retaining a copy of the written Complaint submitted by the complainant.

## **G. EXAMPLES**

### **Example 1: Factual Communications**

**(See Section D, clause 1)**

The following are examples of communications that would come within the definition of a Factual Communication:

- an Electronic Message from a private law firm, which includes an information sheet outlining the effects of a particular court decision. At the bottom of sheet the law firm may have the firm name, address, contact details and logo. This message could be seen to be commercial in nature as ultimately the message is designed in some way to promote the interests of the private law firm. However, as the message only contains factual information plus the allowable contact information it would come within the definition of a Factual Communication;
- an electronic version of a neighbourhood watch newsletter which is sponsored by the local newsagent;
- an electronic newsletter from the local chamber of commerce which is sponsored by one of its members;
- an e-mail message promoting a birdwatching enthusiasts' website with a link to the website, where the website provides purely factual information relating to birdwatching but is sponsored by a commercial entity.

## **Example 2: Express Consent - Sending Commercial Communications**

**(See Section D, subclause 2.3.1)**

- A customer fills in a form, signs and provides personal details and permission to be sent Commercial Communications. (The purpose of the form is to obtain agreement for inclusion on a mailing list).
- A voluntary check box or tick box appears on a form accompanied by an express statement that if the box is ticked by the Recipient, the Recipient may be sent Commercial Communications.
- A Relevant Electronic Account Authority representing an Organisation nominates Recipients from within an Organisation to receive Commercial Communications from the Message Originator.
- A customer signs up for a trial or promotional offer where it is clearly stated that it is a condition of the offer that future Commercial Communications will be sent to them by the promotional provider.
- A Recipient becomes a member of an Organisation where the receipt of Commercial Communications from that Organisation, or from sponsors and partners of that Organisation is expressly part of the membership agreement.

### **Example 3: Consent Withdrawn or Denied**

**(See Section D, clause 2.6)**

- ***Withdrawn Consent where an existing and continuing relationship exists.***

If a bank, having Inferred Consent from a customer by virtue of an existing and continuing relationship, sends a Commercial Communication to that customer and the customer indicates that they do not wish to receive any further such communications by selecting the Unsubscribe function, then Consent has been withdrawn. Consent can also be withdrawn by the Recipient advising the Message Originator or Message Authoriser by other means such as by telephone or facsimile.

- ***Denied Consent where there is no existing relationship but there is a potential for one and the prospective Recipient has provided their Electronic Address in a context which indicates that they have an interest in establishing a relationship.***

Where, during the course of business discussions, a Message Originator receives a business card from a Recipient which includes their Electronic Address details and subsequently sends a Commercial Communication to that Recipient and that Recipient selects the Unsubscribe function, then Consent has been withdrawn. Consent can also be withdrawn by the Recipient advising the Message Originator or Message Authoriser by other means such as by telephone or facsimile.

- ***Denied Consent by conspicuous publication.***

Consent can also be denied by a Recipient publishing a notice adjacent to their conspicuously published Electronic Address advising that they do not wish to receive Unsolicited Commercial Communications without first providing Express Consent.

- ***Unsubscribe Facility where a Message Originator or Message Service Provider offers multiple subscription services.***

In the case of a Message Originator or Message Service Provider offering multiple subscription services, the Message Originator or Message Service Provider may make a link available to which the subscriber can gain access to their own personal subscription profile. This profile contains details of each service to which they are subscribed and will also offer the subscriber the ability to Unsubscribe from one or more of those services.

**Example 4: Reasonable Expectation**  
**(See Section D, subclause 2.4.2)**

- Where a person has entered into a dialogue with a vendor regarding the potential supply of goods or services and has provided either their business card or their electronic account details, then they would reasonably expect to receive Commercial Communications from the business provided that the content of the communications related to the goods or services which are the subject of the original discussions or had relevance to them;
- Where a person has entered into a competition and has supplied their Electronic Address details as part of the entry process, then that person could reasonably expect to receive Commercial Communications from the competition organiser provided that the person has been clearly informed by way of a readily seen notice.

**Example 5: Unsubscribe Facility**  
**(See Section D, clause 10.1)**

Deleting Recipients details from the contact database would not be sufficient to satisfy clause 10.7. Instead, the details of Unsubscribed Recipients should only be retained, where necessary, to ensure that the Recipient's wishes continue to be respected. The information should not be used or disclosed for any other purpose and in all cases should be treated in accordance with National Privacy Principle 4.2 (i.e. to take reasonable steps to destroy or permanently de-identify personal information when it is no longer needed for this purpose). An example of an effective Unsubscribe facility would be the operation and maintenance of an in-house suppression file. This involves the Message Originator or Message Service Provider flagging the Recipient's details within the contact database to indicate that they should not be sent further Commercial Communications unless they resubscribe to the service.



## **H. SCHEDULE - CRITERIA THE ACA WILL CONSIDER IN ACCREDITING RECOGNISED INDUSTRY BODIES FOR THE PURPOSES OF THE AUSTRALIAN EMARKETING CODE OF PRACTICE.**

To be accredited as a Recognised Industry Body for the purposes of the Australian eMarketing Code of Practice (the Code), the ACA will require bodies to meet the following criteria:

### **Web-based facilities for Code and applications for signatory status**

1. The Body must post on its website in a reasonably prominent position:
  - a. A copy of the Code;
  - b. A web-based application form supplied by the ACA for signatory status to the Code.
2. The Body must have a process for:
  - a. Receipt of completed applications forms from their members;
  - b. Supplying copies of these completed forms to the ACA.

### **Complaint handling procedures**

3. In addition to the Body complying with the Code Rules 12.12-12.24 (section D), the proposed Complaint handling procedures of the Recognised Industry Body must have the following characteristics:
  - a. **ACCESSIBILITY:** The procedures must be readily available to complainants referred by the ACA, easy to use and have no cost barriers;
  - b. **INDEPENDENCE:** The decision-making process and administration will be independent of the members who may receive Complaints;

- c. FAIRNESS: The procedures will produce decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based;
- d. ACCOUNTABILITY: Decisions and systemic issues identified from Complaints will be reported to the ACA who in its regulatory role may report publicly on this aggregated information; and
- e. EFFICIENCY: The process will operate efficiently by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

These characteristics are based on and further detail can be found at:

*Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, available at: <http://www.selfregulation.gov.au/publications/BenchmarksForIndustry-BasedCustomerDisputeResolutionSchemes/index.asp>

The ACA reserves the right to remove accreditation of a Recognised Industry Body should any of these criteria not be met in future.

#### **Listing on ACA website**

- 4. Recognised Industry Bodies and their website addresses will be listed on the ACA's website at [www.aca.gov.au](http://www.aca.gov.au).

Applications for nomination as a Recognised Industry Body should address the above criteria and be made in writing to:

Executive Manager  
Consumer and Universal Service Group  
Australian Communications Authority  
PO Box 13112 Law Courts  
Melbourne VIC 3001

Or by email: [Anti-SpamTeam@aca.gov.au](mailto:Anti-SpamTeam@aca.gov.au)