

# Industry Bodies and Schemes in the Communications Sector: Rule-making Frameworks and Consumer and Citizen Engagement

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# Introduction

This is a supplementary report to *Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making*, also completed in November 2019. It serves as the foundation for observations we make in *Responsive Engagement*, offering additional information on the various communications industry schemes considered in that report. Overall, our research looks at methods of engaging consumers and the public in self- and co-regulation within the Australian advertising, media, online and telecommunications sectors.

## The industry schemes

The summaries of industry schemes contained in this report were compiled in 2018 as part of Stage 1 of our research for this project. We identified 20 self- and co-regulatory schemes within the Australian advertising, media, online and telecommunications sectors. In alphabetical order, they are:

- Alcohol Beverages Advertising Code scheme (ABAC scheme)
- .au Domain Administration Limited (auDA)
- Australian Association of National Advertisers (AANA)
- Australian Broadcasting Corporation (ABC)
- Australian Community Television Alliance (ACTA)
- Australian Direct Marketing Association (ADMA)
- Australian Food and Grocery Council (AFGC)
- Australian Narrowcast Radio Association (ANRA)
- Australian Press Council (APC)
- Australian Subscription Television and Radio Association (ASTRA)
- Communications Alliance (Comms Alliance)
- Community Broadcasting Association of Australia (CBAA)
- Commercial Radio Australia (CRA)
- Federal Chamber of Automotive Industries (FCAI)
- Free TV Australia (Free TV)
- Independent Media Council (IMC)
- Interactive Advertising Bureau Australia (IAB)
- Media, Entertainment and Arts Alliance (MEAA)
- Special Broadcasting Service (SBS)
- Standards Australia.

We then prepared the summaries set out in this report, taking account of available information on the schemes' rule-making processes and their mechanisms for consumer and public engagement.

Despite our extensive searches of publicly available information, we were unable to find any information about ACTA's rule-making processes and its mechanisms for consumer and public engagement. For this reason, this report comprises 19 rather than 20 summaries.

Each summary was prepared on the basis of information in the public domain. Relevant information was found in sources such as: annual reports; media releases; reports issued by the schemes; evidence and submissions made to Parliamentary committees and regulatory inquiries; and online resources, including the websites of the 19 schemes and those of the regulators, the Australian Communications and Media Authority (along with its predecessors the Australian Broadcasting Authority and the Australian Communications Authority) and the Australian Competition and Consumer Commission.

Each summary was sent to the relevant scheme for review in the second half of 2018. We also asked all 20 schemes to provide any additional information they believed would assist us with our research. We received comments on summaries and/or additional information from 16 of them: auDA, AANA, ABAC, ABC, ANRA, APC, ASTRA, Comms Alliance, CBAA, CRA, FCAI, Free TV, IMC, MEAA, Standards Australia and SBS. Where necessary and appropriate (eg, to correct factual inaccuracies or to supplement information on the public record) the summaries were amended to reflect comments received. Despite sending several requests via email and/or speaking to their representatives, we did not receive comments on summaries about ADMA, AFGC or IAB.

## The outcomes of our research

In Stage 2 of our research we used the information gathered in Stage 1 to identify 22 distinct engagement mechanisms. We then involved representatives from a number of these schemes, as well as regulators and consumer representatives, in a series of Round Table meetings held in May 2019 to discuss our preliminary findings. The summaries in this report are therefore based primarily on information in the public domain – in some cases amended to reflect the additional information we received – describing the operation of these schemes as at 2018. Some additional information is provided on activities that continued into 2019.

*Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making* is the final report of our research. In it, we map and classify the 22 engagement mechanisms. We start from the principle that involving consumers and citizens in rule-making helps to make industry regulation more responsive. By this we mean it facilitates the exercise of independent judgement by industry, the disclosure by industry of information necessary to hold it to account, greater deliberation of alternatives and ways of meeting the needs of all stakeholders and the explanation and justification by industry of its position to others. We conclude by recommending some ways in which adapting engagement mechanisms could improve responsiveness of rule-making in these sectors.

The research received funding under the Australian Communications Consumer Action Network (ACCAN) research grant funding scheme. The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers.

*Responsive Engagement* will be published by ACCAN in late 2019.

Karen Lee and Derek Wilding

# Alcohol Beverages Advertising Code (ABAC) Responsible Alcohol Marketing Code

## A. Development of Code

The Alcohol Beverages Advertising Code (ABAC) Scheme (the Scheme) applies to alcohol advertising in Australia. The key components that make up the Scheme include: the *ABAC Responsible Alcohol Marketing Code* (the Code), the Alcohol Advertising Pre-vetting Service (AAPS) and the ABAC complaints handling process (ABAC Adjudication Panel).<sup>1</sup> The ABAC signatories represent over 90% of alcohol producer media spend in Australia.<sup>2</sup> The Scheme is jointly funded by its signatories, including: the Brewers Association of Australia, Spirits and Cocktails Australia (formerly the Distilled Spirits Industry Council of Australia), and the Winemakers Federation of Australia. It also has funding from direct signatories and users of the AAPS,<sup>3</sup> including: Coles Liquor, Australian Beer Co, Asahi, Endeavour Drinks Group, Campari Australia, and Coca-Cola Amatil.

The AAPS is a user-pay service which provides advertisers with the opportunity to seek confidential advice as to whether their proposed advertisements comply with the Code, prior to the advertisements being published or broadcast.<sup>4</sup> Signatories of the ABAC can use this service, as well as non-signatories who register for the pre-vetting service for a higher fee.<sup>5</sup> If the advertisement passes the pre-vetting stage, the marketer will be provided with an AAPS approval number, but it is still subject to the ABAC complaints scheme.<sup>6</sup> Marketers are able to seek review from the AAPS Review Panel if they are dissatisfied with the pre-vetting decision.<sup>7</sup>

Complaints under the Code are lodged with Ad Standards. When a complaint is received by Ad Standards, it is sent to the ABAC Chief Adjudicator who determines whether the complaint falls within the ambit of the ABAC Scheme. If it does, the complaint is referred to the ABAC Adjudication Panel for determination.<sup>8</sup> The Adjudication Panel consists of five members, independent of the alcohol industry. At least three are required to determine a complaint.<sup>9</sup> Of the three panel members making a determination, at least one must have a professional background relating to public health.<sup>10</sup>

Finally, the Code sets out the standards for alcohol marketing in Australia. The Code is designed to ensure that alcohol is marketed in a responsible manner. Signatories to the Code commit to ensuring their advertising content complies with the Code and that they will abide by decisions of the ABAC Adjudication Panel.<sup>11</sup>

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<sup>1</sup> ABAC, *Guidance Notes – ABAC Responsible Alcohol Marketing Code* (2012) <<http://www.abac.org.au/wp-content/uploads/2018/06/ABAC-Guidance-Notes-7-6-18.pdf>>.

<sup>2</sup> ABAC, 'Signatories to the Scheme' <<http://www.abac.org.au/about/signatories/>>.

<sup>3</sup> ABAC, 'Frequently Asked Questions' <<http://www.abac.org.au/about/faq/>>.

<sup>4</sup> ABAC, 'Alcohol Advertising Pre-Vetting Service' <<http://www.abac.org.au/about/alcohol-advertising-pre-vetting-service/>>.

<sup>5</sup> ABAC, 'For Advertisers' <<http://www.abac.org.au/for-advertisers/>>.

<sup>6</sup> ABAC, above n 4.

<sup>7</sup> ABAC, above n 5.

<sup>8</sup> ABAC, 'Adjudication Panel' <<http://www.abac.org.au/about/adjudication-panel/>>.

<sup>9</sup> ABAC, above n 3.

<sup>10</sup> ABAC, above n 8.

<sup>11</sup> ABAC, *ABAC Responsible Alcohol Marketing Code* (1 November 2017) s 1.

The Code first came into operation on 1 July 1998,<sup>12</sup> and has seen substantial changes in 2004, 2009, 2014 and 2017.<sup>13</sup>

## B. Consumer and citizen engagement

The ABAC Scheme is overseen by a Management Committee (the Committee). The Committee is responsible for managing and reviewing the operation of the ABAC Scheme, as well as considering amendments to the Code.<sup>14</sup>

The Committee meets at least four times per year,<sup>15</sup> and is made up of representatives from the Brewers Association of Australia, Winemakers Federation of Australia, Distilled Spirits Industry Council of Australia, The Communications Council,<sup>16</sup> and a government representative.<sup>17</sup> The inclusion of a government representative has been described by ABAC as ‘adding an extra layer of accountability, and reinforces the importance of the Code reflecting community expectations’.<sup>18</sup> ABAC advised that the current government representative is the relevant Assistant Secretary from the Commonwealth Department of Health and that the appointment occurs by operation of Rule 1.1E of the ABAC Rules and Procedures.<sup>19</sup> The Committee may also appoint an Independent Chair. The Independent Chair (at the time of writing) was former Speaker of the House of Representatives Mr Harry Jenkins AO.<sup>20</sup>

When the Code was first reviewed in 2004, the review process included industry and government stakeholders.<sup>21</sup> The review was undertaken by a ministerial sub-group of the intergovernmental Ministerial Council on Drug Strategy which met with members of the ABAC Management Committee. After six months, the result was ‘an exchange of letters between industry and government’ on changes to the Scheme.<sup>22</sup> There does not appear to have been any public consultation. The updated Code came into effect in May 2004.<sup>23</sup> Changes included a government representative joining the Management Committee for the first time, and a specialist in public health was added as a permanent addition to the Adjudication Panel.<sup>24</sup>

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<sup>12</sup> ABAC, above n 3.

<sup>13</sup> ABAC, *20 Years of Australia’s Responsible Alcohol Marketing Code* (2018) <<http://www.abac.org.au/wp-content/uploads/2018/06/ABAC-20-Years-Final.pdf>>.

<sup>14</sup> ABAC, *Rules and Procedures* (2018) <<http://www.abac.org.au/wp-content/uploads/2018/04/ABAC-Rules-and-Procedures-13-3-18.pdf>>.

<sup>15</sup> *Ibid*, 1, 1.4.

<sup>16</sup> The Communications Council, ‘About’ <<https://www.communicationscouncil.org.au/public/content/ViewCategory.aspx?id=315>>. Note: The Communications Council is the peak professional not-for-profit industry body representing companies in the Australian advertising industry.

<sup>17</sup> ABAC, ‘Management Committee’ <<http://www.abac.org.au/about/management-committee/>>.

<sup>18</sup> ABAC, *Annual Report 2012* (2012) <[http://www.abac.org.au/wp-content/uploads/2013/06/ABAC\\_AR\\_12\\_Final.pdf](http://www.abac.org.au/wp-content/uploads/2013/06/ABAC_AR_12_Final.pdf)>.

<sup>19</sup> Advice to the authors from Harry Jenkins, Chair of the ABAC Management Committee, letter dated 14 September 2018.

<sup>20</sup> ABAC, ‘Harry Jenkins AO Appointed New Independent Chair of ABAC’ (Media Release, 18 June 2018) <<http://www.abac.org.au/wp-content/uploads/2018/06/Harry-Jenkins-the-new-Chair-of-ABAC-Media-Release-18.6.181.pdf>>.

<sup>21</sup> ABAC, above n 13, 2.

<sup>22</sup> The three ministers were from New South Wales, Victoria and the Commonwealth. See ABAC, *Annual Report 2004* (2004) 6 <[http://www.abac.org.au/wp-content/uploads/2013/05/ABAC-Annual-Report-2004\\_.pdf](http://www.abac.org.au/wp-content/uploads/2013/05/ABAC-Annual-Report-2004_.pdf)>.

<sup>23</sup> *Ibid* 12.

<sup>24</sup> ABAC, above n 13, 2.



The Code was again updated in 2009 to cover the naming and packaging of alcohol products.<sup>25</sup> It is assumed the changes were made by the Management Committee; however, there is no information available about the consultation process for these changes.

Community standards research was outsourced to Colmar Brunton Social Research in 2013.<sup>26</sup> In its 2013 Annual Report, ABAC said the Committee would use this research to assist in a review of the Code.<sup>27</sup> ABAC's Annual Report for 2014 states that the new Code, which took effect from 1 July 2014 and extended its coverage to 'marketing collateral', was the result of 'extensive stakeholder engagement and a comprehensive review of the existing Code's coverage and standards'.<sup>28</sup> However, further information on this stakeholder engagement, including who was consulted, is not provided.

Colmar Brunton Social Research was again commissioned in 2017 to perform another round of community standards research.<sup>29</sup> Following the review, the Code was extended by the Committee to cover the placement of advertisements and became effective from 1 November 2017.<sup>30</sup> Information on who was consulted or how these changes were made is not publicly available; however, ABAC advised us in writing that in conducting periodic reviews, the Management Committee considers 'a wide range of stakeholder feedback', including the following:

- 'Qualitative and quantitative consumer feedback received during periodic research by Colmar Brunton on ABAC and alcohol marketing
- Input from the Government Representative
- Community, consumer and public health comment and concerns evident from media
- Community, consumer and public health concerns expressed when making complaints to Ad Standards
- Community, consumer and public health submissions to Government inquiries that relate to ABAC and alcohol marketing
- Alcohol, advertising and media industry feedback
- Insights and assessments by the independent ABAC Adjudication Panellists on new and emerging trends.'<sup>31</sup>

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<sup>25</sup> ABAC, *Annual Report 2009* (2009) <<http://www.abac.org.au/wp-content/uploads/2013/05/ABAC2009AnnualReport.pdf>>.

<sup>26</sup> Colmar Brunton, *Alcohol Beverages Advertising (and Packaging) Code Scheme – Review of ABAC Code Decisions* (Final Report, 9 May 2013) <<http://www.abac.org.au/wp-content/uploads/2013/06/ABAC-Community-Perceptions-Report-May-2013.pdf>>. Note: Colmar Brunton is the largest independent Australian owned market research agency. See Colmar Brunton, 'Our Expertise' <<https://www.colmarbrunton.com.au/our-expertise/>>.

<sup>27</sup> ABAC, *Annual Report 2013* (2013) 8 <[http://www.abac.org.au/wp-content/uploads/2013/05/ABAC\\_AR\\_13\\_sgn-off.pdf](http://www.abac.org.au/wp-content/uploads/2013/05/ABAC_AR_13_sgn-off.pdf)>.

<sup>28</sup> ABAC, *Annual Report 2014* (2014) <[http://www.abac.org.au/wp-content/uploads/2015/06/ABAC\\_AR\\_14\\_2.pdf](http://www.abac.org.au/wp-content/uploads/2015/06/ABAC_AR_14_2.pdf)>.

<sup>29</sup> ABAC, above n 13, 6.

<sup>30</sup> ABAC, 'Marking 20 Years of Responsible Alcohol Marketing' (Media Release, 30 June 2018) <<http://www.abac.org.au/wp-content/uploads/2018/06/20-years-of-ABAC-Media-Release-Final-30-6-18.pdf>>.

<sup>31</sup> Jenkins, above n 19.

## .au Domain Administration Limited (auDA)

Established in April 1999, auDA is a not-for-profit company limited by guarantee with seven principal purposes, including:

- To be the administrator of, and the Australian self-regulatory policy body for, the .au country code Top Level Domain (ccTLD) and its associated second level domains;
- To maintain and promote the operational stability and utility of the .au ccTLD and more generally the Internet's unique identifier system;
- To ensure a cost effective administration of the .au ccTLD and its sub-domains;
- To develop and establish a policy framework for the development and administration of the .au ccTLD including: (i) rules governing the operations of second level domain name registries; (ii) the creation of second level domains; (iii) rules governing the accreditation of registrars and registry operators; (iv) rules governing the registration of names within second level domains and access to second level domain registries; and (v) ensuring that registrars have equal access to second level registry services (collectively referred to by auDA as 'policies');
- To manage the operation of critical technical functions including: (i) the primary and secondary .au name servers; (ii) the zone files for second level domains; and (iii) a searchable data base containing information on registrations within the .au ccTLD;
- To liaise with national and international bodies on issues relating to the development and administration of domain name systems; and
- To establish appropriate complaints handling and dispute resolution processes to provide for conciliation or redress of grievances on matters associated with the administration of the .au ccTLD.<sup>1</sup>

auDA was endorsed by the Australian government in 2000 and following a review by the Department of Communications and the Arts (DOCA) that began in 2017,<sup>2</sup> again in 2018. The 2018 endorsement is 'contingent' upon auDA implementing a number of reforms by April 2020.<sup>3</sup>

It is stated in the preamble to the 2018 terms of endorsement that the .au ccTLD is an 'important resource, given the growing reliance of Australians on the .au namespace for economic and social activities' and 'the management of the .au domain must support multi-stakeholder engagement and be administered in the public interest'. In addition, it is stated that responsibility for the administration of .au is 'ultimately derived from, and is subject to, the authority of the Commonwealth.'<sup>4</sup>

At the time of writing, auDA was still implementing the measures needed to comply with the government's 2018 terms of endorsement.<sup>5</sup> The framework and processes adopted by auDA

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<sup>1</sup> *Constitution of .au Domain Administration Ltd ACN 079 009 340* (2018) cl 1.2.

<sup>2</sup> See, eg, Department of Communications and the Arts, *Review of Australia's .au Domain Management: Discussion Paper* (November 2017); Department of Communications and the Arts, *Review of Australia's .au Domain Management* (April 2018).

<sup>3</sup> *Review of Australia's .au Domain Management*, above n 2, 42-44. See also the attachment to Letter from Mitch Fifield (Minister for Communications) to Chris Leptos (Chair, auDA Board), 16 April 2018.

<sup>4</sup> *Review of Australia's .au Domain Management*, above n 2, 42.

<sup>5</sup> See, eg, auDA, *Review of Australia's .au Management: Implementation Plan* (May 2018).

to develop and review its policies fell outside the scope of DOCA's review of auDA in 2017. The focus of DOCA's 2017 review was on auDA's governance arrangements.

## A. Development of policies

### 1. 1999 to September 2018

Between 1999 and September 2018, auDA's constitution stated that Advisory Panels were the principal mechanism to be used by the auDA Board for the purpose of 'develop[ing] and establish[ing] a policy framework for the development and administration of the .au ccTLD.' The policy framework covers matters including: '(i) rules governing the operations of second level domain name registries; (ii) the creation of second level domains; (iii) rules governing the accreditation of registrars and registry operators; (iv) rules governing the registration of names within second level domains and access to second level domain registries; and (iv) ensuring that registrars have equal access to second level registry services.'<sup>6</sup>

auDA was also required under its constitution to 'seek to achieve' the development and establishment of its policy framework through certain activities including: establishing mechanisms to ensure auDA was responsive and accountable to the supply and demand sides of the Australian internet community; the promotion of competition of the provision of domain name services; the promotion of fair trading and consumer protection; and adopting open and transparent procedures which were inclusive of all parties having an interest in the use of the domain name system in Australia.<sup>7</sup> Consequently, when engaged in their work, Advisory Panels had to ensure that the rules they developed advanced or promoted these objectives.<sup>8</sup>

Rules and procedures relating to Advisory Panels were set out in clauses 24.8 (Advisory Panels) and 24.9 (Procedure of Advisory Panels) of the auDA constitution. Clause 24.8 stated that directors of the Board may appoint individuals to chair an Advisory Panel and provide an Advisory Panel with 'a brief to investigate, analyse and advise or report to [them] regarding a particular issue or objective'.<sup>9</sup> The Chair of an Advisory Panel was permitted to invite any interested auDA member or other person to participate in that Advisory Panel.<sup>10</sup> Chairs of Advisory Panels had to report in writing to the auDA Board on their activities from time to time and they had the discretion to convene meetings of Advisory Panels and determine their procedures, subject to any conditions imposed by the auDA Board.<sup>11</sup>

It appears that slightly different rules and procedures were used to establish the 13 Advisory Panels created between 2000 and 2018<sup>12</sup> and to select the members for these panels. In addition, the operational processes of these Advisory Panels differed in certain respects, even though they were broadly similar. The summary of auDA's rule-making processes and procedures (below) is based on a review of the following documentation available on auDA's

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<sup>6</sup> See, eg, pre-2018 versions of the *Constitution of .au Domain Administration Ltd ACN 079 009 340* cl 24.8(a).

<sup>7</sup> *Ibid* cl 3.2.

<sup>8</sup> Email from .auDA representative to Karen Lee, 19 October 2018.

<sup>9</sup> Pre-2018 versions of auDA's constitution, above n 6, cl 24.8(b).

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* cl 24.9.

<sup>12</sup> They are the Competition Model Advisory Panel (2000-2001), the Name Policy Advisory Panel (2000-2001), the New Names Advisory Group (2002-2003), the Registry Competition Review Panel (2004), the Name Policy Review Panel (2004), the 2007 Names Policy Panel, the Industry Competition Advisory Panel (2008), the New 2LDs Advisory Panel (2009-2010), the 2010 Names Policy Panel (2010-2011), the 2012 Industry Advisory Panel, the 2015 Names Policy Panel and the 2017 Policy Review Panel.

website: the minutes of the auDA Board and the terms of reference and minutes of the 13 Advisory Panels established between 2000 and 2018. However, some of the links to the documentation on auDA's website, including, in particular, the links to the auDA Board's minutes of meetings held in 1999, were broken. The documentation was not always complete. It did not always include all relevant annexures and/or did not fully address many of the issues that are the focus of this summary.<sup>13</sup>

#### a) Advisory Panels 2000 to 2006

On 7 April 2000,<sup>14</sup> the auDA Board adopted a document entitled *Advisory Panel Procedures* (referred to below as the 2000 Advisory Panel Procedures).<sup>15</sup> The 2000 Advisory Panel Procedures were developed in 1999-2000 following several rounds of public consultation and were in effect between 2000 and 2006.<sup>16</sup> They specified that the process for establishing Advisory Panels was as follows in the paragraph below.

The auDA Board established Advisory Panels by way of resolution. The activities Advisory Panels were to undertake and 'the individuals and representative organisations ... initially invited to participate in the Panel'<sup>17</sup> were specified by the Board in their terms of reference. The auDA Board then called for expressions of interest to participate on Advisory Panels. To facilitate the call for expressions of interest, auDA administrators usually placed an announcement on the auDA website and took other measures to 'actively contact appropriate organisations'.<sup>18</sup> The Board appointed the Chair and members of the Advisory Panel from among those individuals who submitted expressions of interest.<sup>19</sup> By following this process it was expected that broad representation on panels from all key stakeholders, including auDA members from each membership class,<sup>20</sup> as well as non-members, would be ensured.<sup>21</sup> The 2000 Advisory Panel Procedures did not prevent members of the auDA Board from serving as Advisory Panel members, but the auDA Board resolved in June 2000 to prohibit their participation.<sup>22</sup> This decision was in effect until the end of 2006.<sup>23</sup>

Once established, all Advisory Panels had 'the responsibility to produce reports by consensus and with public consultation and input', working within their terms of reference and in consultation with the auDA Board. Advisory Panels were free to adopt their own definition of consensus, but if they did not, consensus was deemed to be achieved if two-

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<sup>13</sup> auDA reviewed two earlier drafts of this summary, but its ability to comment on their accuracy was affected by a number of staffing changes over the last two years and the consequential loss of corporate knowledge. It did not have the resources to assist with analysis of the documents. Email from .auDA representative to Derek Wilding, 22 June 2018; email from .auDA representative, 19 October 2018, above n 8.

<sup>14</sup> auDA Board, Minutes, 7 April 2000.

<sup>15</sup> auDA, *Advisory Panel Procedures* (7 April 2000).

<sup>16</sup> Email from .auDA representative, 22 June 2018, above n 13.

<sup>17</sup> *Advisory Panel Procedures*, above n 15, s 3(4).

<sup>18</sup> Ibid s 4(1). Board minutes suggest auDA members and individuals/organisations on auDA discussion lists were sent emails with the call for expressions of interest. See, eg, auDA Board, Minutes, 1 May 2000 and 5 June 2000.

<sup>19</sup> Email from .au Domain Administration Limited, 22 June 2018, above n 13. auDA administrators also appear to have prepared short lists of panel members for the auDA Board to review. See, eg, auDA Board, Minutes, 5 June 2000.

<sup>20</sup> Until 14 August 2006, there were three classes of members: demand, supply and representative association. Representative association class members included universities, government departments and peak industry bodies. From 14 August 2006 until the adoption of a new constitution in September 2018, there were two classes of members: demand and supply.

<sup>21</sup> *Advisory Panel Procedures*, above n 15, s 4. Note, however, that the members of the Competition Model Advisory Panel (2000-2001) and the Name Policy Advisory Panel (2000-2001), both 'established as part of the process for transitioning the delegation for the .au CCTLD from Robert Elz to auDA', were 'co-opted from the auDA membership base.' See Email from .auDA representative, 22 June 2018, above n 13.

<sup>22</sup> auDA Board, Minutes, 5 June 2000.

<sup>23</sup> Email from .auDA representative, 22 June 2018, above n 13.

thirds of their members agreed.<sup>24</sup> If consensus could not be achieved, the Chair of an Advisory Panel could call a simple vote to determine the views of members, provided the views of dissenters were reported in the findings of the Advisory Panel. Moreover, Advisory Panels were expected to 'consult widely with the Australian Internet community, including other advisory panels, consumer and industry associations and government authorities' and to follow the auDA public consultation procedure, which is described in more detail in section B (1).

Chairs and members of Advisory Panels were responsible for determining the 'operational procedures' of their panels,<sup>25</sup> unless the relevant terms of reference for the Advisory Panel otherwise specified.<sup>26</sup> Examples of operational matters determined by chairs of Advisory Panels included the ability of panel members to appoint proxies, conflict of interest rules, confidentiality, reporting, and publicity.<sup>27</sup>

The Board voted to determine if any recommendations made by Advisory Panels should be accepted.<sup>28</sup> Recommendations were accepted if a majority of the Board's directors voted in favour of them.<sup>29</sup> The Board was expected to accept or reject any Advisory Panel recommendations within 45 days of receiving them. If it did not accept a recommendation, it had to notify the Chair of the Advisory Panel and invite the Advisory Panel to address its concerns by way of a supplementary report within 14 days (or other time period specified by the Board). If, after receipt of a supplementary report, the Board was still unwilling to approve a recommendation, it was required to publish the Advisory Panel's report and supplementary report along with the reasons for its decision.<sup>30</sup>

#### **b) Advisory Panels 2007 to 2016**

During this period, it appears that the processes used by the auDA Board to establish Advisory Panels and by Advisory Panels to formulate rules were broadly similar to those in effect between 2000 and 2006. However, the following differences should be noted.

- The Board permitted members of the auDA Board to serve as members of Advisory Panels, and Board members were appointed to Advisory Panels.<sup>31</sup>
- auDA was authorised to provide financial assistance, where required, to Advisory Panel members, such as not-for-profit organisations and individuals whose participation in an Advisory Panel was not funded by their employer.<sup>32</sup>

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<sup>24</sup> It appears that Advisory Panels convened during this period adopted the definition of consensus set out in the 2000 Advisory Panel. See the minutes of the first meetings of the Competition Model Advisory Panel (2000-2001), the Name Policy Advisory Panel (2000-2001), the New Names Advisory Group (2002-2003), the Registry Competition Review Panel (2004) and the Name Policy Review Panel (2004).

<sup>25</sup> *Advisory Panel Procedures*, above n 15, s 5; pre-2018 versions of the auDA constitution, above n 6, cl 24.9.

<sup>26</sup> Some terms of reference for Advisory Panels state, 'Members of the panel will determine their method of operation, subject to auDA's Advisory Panel Procedures.' See, eg, Name Policy Advisory Panel (2000-2001) Terms of Reference; New Names Advisory Panel (2002-2003) Terms of Reference.

<sup>27</sup> See, eg, Registry Competition Review Panel, Minutes, 12 August 2004.

<sup>28</sup> pre-2018 versions of auDA's constitution, above n 6, cl 24.8(a).

<sup>29</sup> *Ibid* 24.5.

<sup>30</sup> *Advisory Panel Procedures*, above n 15, s 8.

<sup>31</sup> Email from .auDA representative, 22 June 2018, above n 13. See also auDA Board, Minutes, 22 October 2007, para 6 and Minutes, 14 December 2009, para 10.

<sup>32</sup> See, eg, auDA Board, Minutes, 9 October 2006; 2007 Name Policy Panel Terms of Reference; Industry Competition Advisory Panel (2008) Terms of Reference; New 2LDs Advisory Panel (2009-2010) Terms of Reference; 2010 Names Policy Panel (2010-2011) Terms of Reference; 2012 Industry Advisory Panel Terms of Reference, 2015 Names Policy Panel Terms of Reference.

- The Board mandated all Advisory Panels to undertake at least two public consultations during the course of its work.<sup>33</sup> However, it required Advisory Panels established between 2000 and 2006 to consult with stakeholders at least twice during the process by publishing, and inviting written comments on, an issues paper<sup>34</sup> and draft recommendations.<sup>35</sup>

### c) 2017 Policy Review Panel

The 2017 Policy Review Panel, which was convened to make recommendations on the development of an implementation policy for direct registration and reforms of auDA's 21 policies in existence at the time, was established by way of a resolution of the auDA Board and the Board appointed its Chair following a call for expressions of interest. However, the Chair of that Advisory Panel subsequently determined the terms of reference and the membership of the Advisory Panel in consultation with the auDA Board.<sup>36</sup> No auDA Board members were appointed to the Advisory Panel. The auDA Board also mandated that the Advisory Panel undertake 'at least two public consultations of the policy reform process' and the panel was permitted to 'use a range of consultation mechanisms, including working groups and online and face-to-face forums'.<sup>37</sup> As for all previous Advisory Panels, the decision-making of the ongoing 2017 Policy Review Panel is to be by consensus. However, consensus has been defined to mean 'a majority of members agree, with the remainder to give way, and if necessary a mention of any objections recorded in the minutes'.<sup>38</sup> The Chair has the deciding vote if the members of the Advisory Panel are equally divided. In addition, eight principles, now set out in an auDA corporate policy document entitled *Process for the Development and Review of auDA Published Policies* (discussed in section A(2)(a) below),<sup>39</sup> informed and continue to inform the discussions of the 2017 Policy Review Panel.<sup>40</sup>

## 2. November 2018 onwards

Since 23 November 2018, all procedures relating to the development of auDA policies have been set out in *Process for the Development and Review of auDA Published Policies*<sup>41</sup> (the 2018 auDA published policies document). auDA published the document as a result of the new transparency and accountability requirements imposed by the Australian government's terms of endorsement in 2018. It details auDA's core policy objectives; eight principles that had been used internally to guide .au policy development since April 2017 and the processes auDA uses to develop policy. The information on processes in the 2018 auDA published policies document also reflects two significant changes made to auDA's

<sup>33</sup> 2007 Name Policy Panel Terms of Reference; Industry Competition Advisory Panel (2008) Terms of Reference; New 2LDs Advisory Panel (2009-2010) Terms of Reference, 2010 Names Policy Panel (2010-2011) Terms of Reference, 2012 Industry Advisory Panel Terms of Reference, 2015 Names Policy Panel Terms of Reference.

<sup>34</sup> See, eg, the public submissions made to the Competition Model Advisory Panel (2000-2001), the Name Policy Advisory Panel (2000-2001), the New Names Advisory Group (2002-2003), the Registry Competition Review Panel (2004) and the Name Policy Review Panel (2004).

<sup>35</sup> See the Registry Competition Review Panel (2004) and Name Policy Review Panel (2004) Terms of Reference.

<sup>36</sup> Email from .auDA representative, 22 June 2018, above n 13. The 2017 Policy Review Advisory Panel includes one member from each of the former 'demand' and 'supply' classes of auDA members, a 'peak' business representative, a consumer protection representative, and a representative from an Australian government regulator.

<sup>37</sup> auDA, 2017 Policy Review Panel Terms of Reference.

<sup>38</sup> auDA, .au Policy Review Panel: Roles and Responsibilities (undated).

<sup>39</sup> auDA, Corporate Policy: Process for the Development and Review of auDA Published Policies (23 November 2018).

<sup>40</sup> See, eg, Email from .auDA representative, 19 October 2018, above n 8; 2017 Policy Review Panel, Minutes, 27 September 2017 and 13 October 2017.

<sup>41</sup> *Corporate Policy: Process for the Development and Review of auDA Published Policies*, above n 39.

constitution in 2018: the removal of the need for Advisory Panels to be the principal mechanism for developing policy and for auDA to engage in certain activities when developing and establishing its policy framework.

auDA's has two core policy objectives. The first is to develop a licensing regime for the .au domain which is, among other things, transparent, responsive, accountable, accessible and efficient; promotes consumer protection, fair trading and competition; and provides only those protections necessary to maintain the integrity, stability, utility and public confidence in the .au ccTLD. The second core objective is to ensure the integrity, stability and security of the Australian domain name system.<sup>42</sup>

The eight principles that guide policy development are as follows:

- Establishing a case for action before a problem is addressed
- A range of feasible policy options will be considered including their costs and benefits
- Adopting the option that generates the greatest net benefit for the Australian community
- Policies should not restrict competition unless it can be demonstrated that (i) the benefits to the Australian community should outweigh the cost; and (ii) the objectives of the policies can only be achieved by restricting competition
- Providing effective guidance and education to stakeholders (including government regulators, registrars, resellers and registrants) to ensure that the policy intent and compliance requirements are clear
- Ensuring that auDA policies remain relevant and effective over time
- Consulting effectively with key stakeholders at all stages of the development and implementation of policy
- Ensuring that all policy outcomes are effective and proportional to the issue being addressed.<sup>43</sup>

The 2018 auDA published policies document states that auDA will now use a variety of mechanisms, including Advisory Committees (previously known as Advisory Panels), 'expert working groups' and auDA management to develop policy.<sup>44</sup> Advisory Committees may be used for the development of 'new policy proposals or a major review of an existing policy to ensure [the existing policy] is effective and efficient in achieving policy objectives.' Moreover, the Board will only establish an Advisory Committee if the issue to be addressed 'has a significant impact on the Australian Internet community'.<sup>45</sup> The policy document does not specify when expert working groups will be used. However, it states that auDA management will be responsible for (i) managing minor policy amendments, where the change is required for administrative, technical or legal reasons; and (ii) drafting the policy to give effect to recommendations of an Advisory Committee that have been approved by the auDA Board.<sup>46</sup>

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<sup>42</sup> Ibid para 7.

<sup>43</sup> Ibid paras 8-18.

<sup>44</sup> Ibid para 20.

<sup>45</sup> Ibid para 21.

<sup>46</sup> Ibid para 43.

### **a) Advisory Committee procedures**

The 2018 auDA published policies document sets out procedures for Advisory Committees. The procedures for Advisory Committees are similar to the 2000 Advisory Panel Procedures. However, they differ from the 2000 Advisory Panel Procedures in a number of ways.<sup>47</sup> The most important differences (that do not relate to consumer and public participation) are set out below. Key differences related to consumer and public participation are summarised in section B below.

- The Board may pass a resolution to establish an Advisory Committee and set its terms of reference only if it is 'satisfied that action is required to address an issue'. When deciding if action is required to address an issue, the Board may take into account stakeholder feedback, the number of parties affected, compliance data, government or advisory body reports, relevant regulatory changes and other relevant information.
- Members of the auDA Board are not eligible to sit on Advisory Committees, although they may attend meetings of Advisory Committees as observers. This change is consistent with the approach used for the 2017 Policy Review Panel and marks a return to auDA's pre-2007 policy with respect to auDA Board members and Advisory Panels.
- The Chair of an Advisory Committee suggests the names of suitable Advisory Committee members to the Board, but the Board may veto a member suggested by the Chair only if there is a 'perceived conflict of interest'. The 2018 auDA published policies document also now specifies that the names and positions of Advisory Committee members must be published on the auDA website, but such practice is not new to auDA. auDA has published the names and positions of Advisory Panel members since 2000.
- The Chair of an Advisory Committee has the power to remove members if they fail to contribute to a panel or are obstructive or disruptive; or their conduct is rude, disparaging or unprofessional. The 2000 Advisory Panel Procedures suggested that the only basis for removing an Advisory Panel member was failure to attend meetings.
- The Board may remove chairs of Advisory Committees if there is inadequate panel progress in achieving its objectives, a conflict of interest or misconduct, including being rude or disparaging of stakeholders.
- Advisory Committees must develop a project plan and timeline for delivering their outcomes, including deliverables, when and how public consultation will be undertaken, and their meeting schedules. The project plan and timeline must be published on auDA's website.
- Advisory Committees cannot adopt their own definition of consensus. Consensus is defined as requiring 'at least 2/3 of the Panel members to agree.' If consensus cannot be achieved, then dissenting views must be noted in the minutes of the relevant meeting of the Advisory Committee (in addition to being reported to the Board).
- The revised constitution requires the auDA Board to 'acknowledge and consider any advice or recommendation received from an Advisory Committee at a Board meeting within 60 days of receiving from an authorised representative of the Advisory Committee

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<sup>47</sup> See .au Policy Review Panel, Minutes, 10 September 2018, item 1.4.1.



a formal and final written report of such advice or recommendation.<sup>48</sup> The 2018, auDA published policies document requires the auDA Board to set out its reasons for rejecting a recommendation of an Advisory Committee in its minutes. Members of auDA may inspect the minutes,<sup>49</sup> but there is no requirement for the auDA Board to publish the Advisory Committee's recommendations or the reasons for rejecting them. However, any decisions made by the auDA Board concerning recommendations made by an Advisory Committee must be recorded in the minutes of the auDA Board (which are made available on auDA's website).

- Before accepting a recommendation of an Advisory Committee, the Board must be satisfied that (i) the Committee recommendation achieves the core policy objectives and complies with the eight policy principles; (ii) effective stakeholder engagement and consultation was undertaken and stakeholders represent a broad cross-section of the Australian Internet Community; (iii) the policy development process was transparent and accountable; and (iv) the policy delivers the greatest net benefit to the Australian Internet Community.

#### **b) auDA Managed Policy Development**

If auDA management is responsible for developing policy, it is required to prepare a draft policy and explanatory statement for submission to the Board.<sup>50</sup> If the Board approves them, they are published on the auDA website and public consultation (which is described further in section B(4)(b) below) begins.

Following public consultation, auDA management must inform the Board of the subject matter of any submissions received and the rationale for accepting or rejecting stakeholder comments. Any changes made to the draft policy and explanatory statement, as a result of submissions, must be brought to the Board's attention. The Board must then approve or reject the draft policy and explanatory statement and, if it approves them, it must determine the date on which the policy comes into effect.

Before accepting a draft policy and explanatory statement, the Board must be satisfied that the same criteria that must be satisfied before accepting an Advisory Committee recommendation are met. If it accepts a draft policy and explanatory statement, the Board must publish them on the auDA website for 21 calendar days before the policy can come into effect. However, this period may be waived if amendments to policies are needed urgently in order to comply with legal requirements or to ensure the integrity, stability or security of the Australian domain name system.

If the Board rejects a draft policy and explanatory statement that seek to implement a recommendation of an Advisory Committee due to significant concerns expressed by stakeholders during public consultation, it may request the Advisory Committee to reconsider the issue and report to the Board with alternative recommendations or it may instruct auDA management to change the draft policy to reflect stakeholder concerns and engage in additional public consultation. The 2018 auDA published policies document states, 'the

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<sup>48</sup> *Constitution of .au Domain Administration Limited*, above n 1, cl 4.1(c).

<sup>49</sup> *Ibid* cl 19.3.

<sup>50</sup> All information in this section may be found in paras 44-52 of *Corporate Policy: Process for the Development and Review of auDA Published Policies*, above n 39.

Board commits to only rejecting policies where the concerns of stakeholders reflect the Australian Internet Community, as a whole, and not sectoral interests.<sup>51</sup>

## B Consumer and citizen engagement

It appears that consumer and public interest organisations were appointed to most (if not all) Advisory Panels. For example, representatives from ACCAN,<sup>52</sup> Consumers' Telecommunications Network (CTN),<sup>53</sup> the Council of Small Business of Australia (COSBOA),<sup>54</sup> Internet Society of Australia (ISOC-AU)<sup>55</sup> (now known as Internet Australia) and the Small Enterprise Telecommunications Centre Ltd (SETEL)<sup>56</sup> have all been appointed to Advisory Panels. Moreover, the 2017 Policy Review Panel includes a designated consumer protection representative. Participation in an Advisory Panel was voluntary.<sup>57</sup> Participation in an Advisory Committee is also voluntary. The Board had no power to compel consumer organisations, government departments, regulators and others to participate in Advisory Panels, and it has no power to compel participation by these groups in Advisory Committees.

Other processes used to consult with consumers and the public during Advisory Panel/Advisory Committee processes are described below.

### 1. Advisory Panels 2000 to 2006

The 2000 Advisory Panel Procedures, in effect between 2000 and 2006 and referred to in section A(1)(a), required Advisory Panels to comply with a specified public consultation procedure.<sup>58</sup> That procedure required draft reports of Advisory Panels and accompanying statements to be posted to the auDA website. The accompanying statements also had to be signed by the Chair of auDA and had to outline the issue(s) in plain English and state 'the requirements of those who wish[ed] to comment' and the procedures to take place after the comment period had closed, among other things. In addition to publication on the auDA website, the accompanying statement was to be emailed to all individuals and organisations on various lists, including the auDA membership and domain name system lists. A minimum of 21 days had to be given for public comment and consultation on a draft report. A revised draft of the report, which took into consideration the comments received, also had to be placed on the auDA website. The individuals and organisations on all relevant lists were to be notified by email that a revised draft was available and a further 14 days had to be given for public comment and consultation. All public comments submitted during public consultation were published on the auDA website.

Based on a review of the consultation papers released by the five relevant Advisory Panels (and available on auDA's website), all organisations and individuals, including consumers and members of the public, were permitted to submit written comments. Electronic

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<sup>51</sup> Ibid para 52.

<sup>52</sup> 2015 Names Policy Panel.

<sup>53</sup> Industry Competition Advisory Panel (2008).

<sup>54</sup> Industry Competition Advisory Panel (2008).

<sup>55</sup> New Names Advisory Group (2002-2003), the Registry Competition Review Panel (2004), the Name Policy Review Panel (2004), the New 2LDs Advisory Panel (2009-2010), the 2012 Industry Advisory Panel and the 2015 Names Policy Panel.

<sup>56</sup> Competition Model and Name Policy Advisory Panels (2000-2001).

<sup>57</sup> Email from .auDA representative, 22 June 2018, above n 13.

<sup>58</sup> See *Advisory Panel Procedures*, above n 15, s 7.

submission was preferred. Sometimes the initial draft report would communicate the anticipated time period during which revised drafts of reports would be made available for comment.<sup>59</sup> It was not always possible to determine the precise amount of time interested parties had to submit written comments. The minutes of the Competition Model Advisory Panel's (2000-2001) meeting on 31 January 2001 suggest four weeks (or 28 days) was given for its stage 3 report.<sup>60</sup> Similarly, consultation on the second report of the Name Policy Advisory Panel (2000-2001) appears to have lasted for four weeks.<sup>61</sup> Moreover, informal public consultation was held during an ICANN meeting.<sup>62</sup> Three weeks appears to have been given by the Registry Competition Review Panel (2004) for its first report.<sup>63</sup> The total number of submissions made by all organisations and individuals during public consultation during this period varied and in some instances was very low because 'domain policy has remained a niche field which has failed to attract broader stakeholder interest,' notwithstanding the importance of domains to the Australian economy and society.<sup>64</sup> For example, 13, 14 and 12 submissions were made respectively to the first, second and third public consultation reports of the Competition Model Advisory Panel (2000-2001).<sup>65</sup> Thirty, three, two and six submissions were made respectively to the first, second, third and fourth public consultation reports of the New Names Advisory Group (2002-2003). The Name Policy Review panel (2004) received seven and six submissions concerning its first and second consultation papers respectively.

## 2. Advisory Panels 2007 to 2016

As stated in section A(1)(b), the terms of reference for Advisory Panels established between 2007 and 2016 required them to undertake a minimum of two rounds of public consultation, which usually involved the release of a discussion or issues paper and a draft report<sup>66</sup> — a requirement which has been included in the 2018 auDA published policies document (see section B(4)(a) below).

As a matter of practice, all organisations and individuals, including consumers and members of the public, were permitted to submit written comments. Electronic submission was preferred. In addition, the New 2LDs Advisory Panel (2009-2010), the 2010 Names Policy Advisory Panel and the 2012 Industry Advisory Panel gave them the option of completing an online survey. As these surveys have long since closed, it was not possible to review the questions posed. It was not always possible to determine the precise amount of time interested parties had to submit written comments or complete the survey. The minutes of the 2 April 2015 and 6 August 2015 meetings of the 2015 Names Policy Panel state that six weeks were given for each of its issues and draft recommendations papers.<sup>67</sup> The minutes of

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<sup>59</sup> See, eg, auDA *Competition Model Advisory Panel, Stage 3 Report for Public Consultation: Proposed Competition Model for the .au Domain Space* (February 2001) 5.

<sup>60</sup> Competition Model Advisory Panel (2000-2001), Minutes, 31 January 2001, item 3.

<sup>61</sup> Name Policy Advisory Panel (2000-2001), Minutes, 30 January 2001.

<sup>62</sup> Competition Model Advisory Panel (2000-2001), Minutes, 28 February 2001, item 2.

<sup>63</sup> Registry Competition Review Panel (2004), Minutes, 24 August 2004, item 2.

<sup>64</sup> Email from .auDA representative, 22 June 2018, above n 13.

<sup>65</sup> See, eg, auDA Board, Minutes, 9 April 2001, item 4 and <<https://www.ada.org.au/policies/panels-and-committees/competition-model-advisory-panel/>>.

<sup>66</sup> Email from .auDA representative, 22 June 2018, above n 13.

<sup>67</sup> 2015 Names Policy Panel, Minutes, 2 April 2015, item 4; 2015 Names Policy Panel, Minutes, 6 August 2015, item 3.

the 5 June 2008 meeting of the 2008 Industry Competition Advisory Panel suggest that four to five weeks were permitted.<sup>68</sup>

The total number of submissions made by all organisations and individuals during public consultation varied and in some instances was very low for the same reason given in section B(1). For example, the 2007 Names Policy Panel received 48 written submissions in response to its issues paper and 25 in response to its draft recommendations paper,<sup>69</sup> but the 2008 Industry Competition Advisory Panel received only five written submissions in response to each of its issues and draft recommendation papers.<sup>70</sup> The New 2LDs Advisory Panel (2009-2010) received seven written submissions in response to its first discussion paper and 63 responses to the online survey.<sup>71</sup> The 2010 Names Policy Advisory Panel received 30 written submissions in response to its first discussion paper and 177 responses to the online survey<sup>72</sup> and 11 written submissions on its second consultation paper and 31 responses to the online survey.<sup>73</sup> The 2012 Industry Advisory Panel received eight written submissions in response to its issues paper and 10 responses to the online survey.<sup>74</sup> Thirty written submissions were received in response to its draft recommendations and 12 individuals or organisations completed the online survey.<sup>75</sup>

Between 2007 and 2016, auDA also commissioned some surveys of .au registrants and internet users. For example, when the 2007 Names Policy Panel was established, Nexus Research carried out three different types of survey: a general public survey, a website survey and a registrants survey. The general public survey was conducted with 800 members of the general public who used the internet at least weekly. The website survey was linked from the auDA website. The registrants survey was mailed directly to a random sample of 9,900 registrants.<sup>76</sup>

### 3. 2017 Policy Review Panel

As mentioned in section A(1)(c), the 2017 Policy Review Panel was required to undertake at least two public consultations and was permitted to use a 'range of consultation mechanisms, including working groups and online and face-to-face forums'.<sup>77</sup> In 2017 and 2018, it published issue papers concerning the implementation of second level domain name registration and changes to its licensing rules (registrant policy).<sup>78</sup> All organisations and individuals, including consumers and members of the public, were permitted to submit written comments by post or e-mail. Anonymous submissions were not considered by the 2017 Policy Review Panel or published on the auDA website. Sixty submissions were received in response to the registrant issues paper.<sup>79</sup> In February 2018, the 2017 Policy

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<sup>68</sup> Industry Competition Advisory Panel (2008), Minutes, 5 June 2008, item 1.

<sup>69</sup> See <<https://www.ada.org.au/policies/panels-and-committees/the-2007-names-policy-panel/>>.

<sup>70</sup> See <<https://www.ada.org.au/policies/panels-and-committees/industry-competition-advisory-panel/>>.

<sup>71</sup> New 2LDs Advisory Panel (2009-2010), Minutes, 25 May 2010, item 1.

<sup>72</sup> 2010 Names Policy Advisory Panel, Minutes, 3 February 2011, item 2.

<sup>73</sup> auDA Board, Minutes, 14 June 2011, item 3.

<sup>74</sup> auDA Board, Minutes, 20 August 2012, item 3.

<sup>75</sup> See <<https://www.ada.org.au/policies/panels-and-committees/2012-industry-advisory-panel/2012-iap-meeting-25-october-2012/>>.

<sup>76</sup> See, eg, 2007 Names Policy Panel, Minutes, 6 March 2007, item 5; 2007 Names Policy Panel, Minutes, 10 April 2007.

<sup>77</sup> 2017 Policy Review Panel Terms of Reference, above n 37.

<sup>78</sup> auDA, *2017 Policy Review Panel* <<https://www.ada.org.au/policies/panels-and-committees/2017-policy-review-panel/>> .

<sup>79</sup> .au Policy Review Panel, Minutes, 15 March 2018, item 1.

Review Panel also held four public forums where direct registration and reform of its existing 21 policies were discussed – one in each of Perth, Sydney, Melbourne and Brisbane.<sup>80</sup>

auDA also noted that the 2017 Policy Review Panel conducted focus groups in November 2018 and February 2019<sup>81</sup> with domain investors, .au registrars, large corporates and representatives from small businesses, government, and the education and not-for-profit sectors. In April 2019, following publication of the Policy Review Panel's final report, auDA launched a public awareness campaign (in addition to its usual means of public communication). Known as the 'shorternames.com.au campaign', the campaign involved the creation of a 'micro' website which explained the proposed policy changes in simple terms and invited individuals to answer three short questions and provide other feedback. The website was advertised by way of two short videos that were distributed via Facebook, Instagram, catch-up TV and the Internet.<sup>82</sup>

Prior to the establishment of the 2017 Policy Review Panel, auDA also undertook a series of 22 in-depth qualitative phone interviews about direct registration with its members and other stakeholders. It subsequently distributed a qualitative online survey to 200,000 .au domain registrants and the general public and undertook an additional 17 in-depth qualitative phone interviews with regulators, industry and other stakeholders.<sup>83</sup>

#### **4. Policy development from November 2018**

##### **a). Advisory Committee Processes**

The 2018 auDA published policies document incorporates a number of amendments to the 2000 Advisory Panel Procedures that have some bearing on consumer and public participation. For example, auDA is explicitly required to use 'multiple communication channels' when seeking expressions of interest for panel membership to encourage broad representation on Advisory Committees from all stakeholders.<sup>84</sup> The project plan and timeline that Advisory Committees develop (see section A(2)(a)) must set out when and how public consultation will be undertaken. Advisory Committees must develop and publish a stakeholder engagement plan, which identifies the relevant stakeholders and how consultation with these stakeholders will be undertaken.<sup>85</sup>

In addition, the 2018 auDA published policies document requires Advisory Committees to consult with stakeholders (i) when identifying feasible options for achieving the relevant policy objectives; and (ii) prior to recommending any option to the Board. Moreover, stakeholders must be given an opportunity to comment on the Advisory Committee's draft final report. A minimum of 20 business days must be given whenever public comment and consultation is undertaken. Advisory Committees must also ensure that stakeholders are

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<sup>80</sup> auDA, *auDA Policy Review Panel Forums 2018* <<https://www.ada.org.au/news/ada-policy-review-panel-forums-2018/>>.

<sup>81</sup> auDA, 'From the PRP: Focus Groups Announced in Relation to Direct Registration Implementation Policy' (24 August 2018); auDA, 'Call for Participants: Focus Groups on Reform of Existing auDA Policies & Implementation of Direct Registration' (21 February 2019). See also auDA Policy Review Panel, *Public Consultation Paper: Reform of Existing Policies & Implementation of Direct Registration* (February 2019) 41.

<sup>82</sup> auDA, *Report to the auDA Board on the Consultation Phase Covering the Management Response to the Policy Review Panel's Report on Direct Registration and Reform of Existing Policies* (May 2019).

<sup>83</sup> See, eg, auDA, *Qualitative Exploration Phase 1: Perception of Implementation Policy for Open Domain Name Registrations Executive Summary* (March 2017); auDA, *Awareness and Perceptions of Direct Registration: Qualitative and Quantitative Insights* (May 2017).

<sup>84</sup> *Corporate Policy: Process for the Development and Review of auDA Published Policies*, above n 39, para 26.

<sup>85</sup> *Ibid* para 35.

able to make confidential submissions and provide a mechanism for stakeholders to engage outside of the public consultation process. Minutes of all meetings and discussions with stakeholders must be taken and published on the auDA website. Finally, in draft reports, Advisory Committees must represent stakeholders' views and the rationale for accepting or rejecting their comments.<sup>86</sup>

At the time of writing, no policies had been developed by an Advisory Committee using the procedures specified in the 2018 auDA published policies document.

#### **b). auDA Managed Policy Development**

auDA must consult publicly for 21 calendar days when it amends policies for technical, administrative or legal reasons and for not less than 28 calendar days for policies or amendments to policies that result from recommendations of Advisory Panels. All public (ie, non-confidential) submissions must be published on the auDA website. Moreover, unless the policy changes are needed to comply with legislative requirements or are technical in nature, auDA must undertake further public consultation where significant changes are made to draft policies in light of submissions made by stakeholders. When consulting for the second time, auDA must publish a redline version of the changes to the draft policy and a statement explaining why the changes were made. auDA must inform the Board about the 'subject matter of submissions and the rationale for accepting or rejecting stakeholder comments'. Any changes to draft policies and their explanatory statements must be brought to the Board's attention.<sup>87</sup>

At the time of writing, no policies had been developed by auDA using the procedures set out in the 2018 auDA published policies document.

### **5. Other avenues for consumer and public participation in auDA**

In its final report on its review of auDA, DOCA recommended that auDA reform its membership rules, among other reasons, to broaden its membership base in order to better reflect the composition of the variety of stakeholders with an interest in the operation of auDA. To that end, it suggested that auDA adopt a single class of membership or 'a functional constituency'<sup>88</sup> membership model whereby members from government, industry, consumer organisations and domain name registrar constituencies would collectively be entitled to appoint at least one or more directors to the auDA Board.<sup>89</sup> The 2018 terms of endorsement require auDA to '[have] a clearly defined membership structure that can represent the view of the Australian internet community',<sup>90</sup> but they do not mandate a particular membership model. In May 2018, auDA established a Consultation Model Working Group to develop an appropriate membership model.<sup>91</sup> When DOCA conducted its review, holders of domain names, internet users and members of the general public, including consumer and public interest organisations, were permitted to become 'demand class members' of auDA. Participants in the domain name industry, including registry operators, registrars and resellers, joined auDA as supply class members. Demand and supply class members were entitled to vote on resolutions during general meetings and to elect four

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<sup>86</sup> Ibid paras 36-39.

<sup>87</sup> Ibid paras 44-49.

<sup>88</sup> *Review of Australia's .au Domain Management*, above n 2, 26.

<sup>89</sup> For the model proposed by auDA, see .au Domain Administration Limited, Submission to Department of Communications and the Arts, *Review of Australia's .au Domain Management*, December 2017, 13-14.

<sup>90</sup> *Review of Australia's .au Domain Management*, above n 2, 43.

<sup>91</sup> *Review of Australia's .au Management: Implementation Plan*, above n 5, 16.

individuals to the Board of auDA.<sup>92</sup> Nevertheless, the rules did not ensure that a representative of a consumer and/or public interest organisation would be appointed to the auDA Board.

In September 2018, auDA's constitution was revised to require the Board to establish General and Technical Advisory Standing Committees. The role of the General Advisory Standing Committee is to receive and consider submissions from members of the general public who are interested in auDA's management, operations, decisions and actions. The role of the Technical Advisory Standing Committee is to receive and consider submissions from members of the general public who are interested in auDA's management, operations, decisions and actions and who have particular knowledge or expertise that relates to technical aspects of auDA's operations, decisions and actions. At the time of writing (10 October 2018), these committees had not yet been created.

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<sup>92</sup> Note the Board also included the CEO of auDA, who was a non-voting member, and three independent directors, each of whom was appointed by the directors who were elected by the supply and demand class members. See pre-2018 versions of auDA's constitution, above n 6, cl 18.2.

# Australian Association of National Advertisers (AANA) Code of Ethics

## A. Development of Codes

The Australian Association of National Advertisers (AANA) is the peak body representing advertisers in Australia. Its members include major national and international companies such as the Commonwealth Bank of Australia and Coca-Cola which pay a levy on media spend; the levy in turn funds a complaints scheme administered by Ad Standards.<sup>1</sup>

The principal self-regulatory instrument developed by AANA is the *Code of Ethics* which applies to advertising and marketing across various media platforms. The Code was introduced in 1997 when Ad Standards was formed, following dissolution of the previous advertising self-regulatory scheme operated under the Advertising Standards Council.<sup>2</sup>

In addition to the *Code of Ethics*, there are other codes published by AANA for which Ad Standards hears complaints.<sup>3</sup> These codes address specific types of advertising:

- *AANA Code for Advertising and Marketing Communications to Children*
- *AANA Food and Beverage Code Advertising and Marketing Code*
- *AANA Environmental Claims Code*
- *AANA Wagering Advertising & Marketing Communications Code.*

Practice notes are issued by the AANA to provide guidance to industry in the application of the codes. For example, the *Code of Ethics Practice Note* was updated in May 2018 to provide further guidance on gender stereotyping.

For codes and for practice notes, the AANA distinguishes between an evaluation process and a review process. An **evaluation process** takes account of information on the operation of the instrument and other relevant local and international developments. A **review** generally includes this evaluation component and then a consultation process with an issues paper. Changes may be made to a code or practice note after either an evaluation or review, or on an ad hoc basis.<sup>4</sup>

## B. Consumer and citizen engagement

AANA has said, 'the AANA codes are developed and evolve in consultation with industry, the ASB and the community, and are informed by international best practice.'<sup>5</sup> The AANA website further states, 'we participate in community and consumer discussions to help

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<sup>1</sup> Ad Standards was formerly known as the Advertising Standards Bureau (ASB). On 14 May 2018, it was reported that the boards of AANA and Ad Standards would merge later in 2018, although the two organisations would retain separate secretariats: Baden Parker-Brown, 'AANA to Amalgamate with the Advertising Standards Bureau', *B&T* (online) <<http://www.bandt.com.au/marketing/aana-amalgamate-advertising-standards-bureau>>.

<sup>2</sup> ASB, *Irk, Eeek, Oh! & Really? 40 Years: Self-Regulation Meeting Community Standards in Advertising* (2015), 14.

<sup>3</sup> Ad Standards also hears complaints under three other codes considered elsewhere in this report (FCAI Motor Vehicle Code; AFGC Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry; AFGC Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children) and acts as a clearing house for complaints under the Alcohol Beverages Advertising Code. See Ad Standards, 'Codes and Initiatives' <<https://adstandards.com.au/codes-and-cases/codes-and-initiatives>>.

<sup>4</sup> Advice to authors from AANA representative, 13 August 2018.

<sup>5</sup> Ad Standards, 'Module 2: Self-regulation in Australia' <[https://adstandards.com.au/sites/default/files/education/module\\_two/story\\_html5.html](https://adstandards.com.au/sites/default/files/education/module_two/story_html5.html)>.



ensure there is genuine engagement and understanding of the self-regulatory regime and invite these groups to input into the Code review process.<sup>6</sup>

AANA has said that when first developing the *Code of Ethics* in 1997 and supporting complaints system, it consulted extensively with consumers, consumer groups, advertisers, businesses, and government representatives.<sup>7</sup> It has also said that the standards set out in its code are 'influenced in part by previous decisions of the ASB, the AANA's intent in developing the *Code of Ethics* and any relevant research (of the AANA or the ASB)'.<sup>8</sup>

Amendments were made to the Code for the first time in 2007 following an evaluation (without public consultation),<sup>9</sup> but it wasn't until 2010 that the AANA conducted its first full-scale review. The review was conducted by an independent reviewer, Dr Terry Beed.<sup>10</sup> The review included the release of a public statement and call for submissions, as well as a direct email and phone campaign to spread awareness of the review.<sup>11</sup> Approximately 55 organisations and individuals took part in the review, with the independent reviewer considering the written submissions and conducting personal interviews.<sup>12</sup> It appears from Dr Beed's general summary that he made specific recommendations to AANA for Code amendments. There is no indication of the process adopted by AANA from this point until the publication of the revised Code in 2012.

In 2016 and 2017, AANA made changes to parts of the *Code of Ethics* but as these were based on evaluations rather than reviews, there was no public consultation. For the 2017 changes, AANA said it had 'taken note of community debate around the use of sexual appeal both in popular culture and in advertising'.<sup>13</sup> It stated that it had also consulted with Ad Standards and other industry bodies, including the Outdoor Media Association.<sup>14</sup>

Changes have also been made to the other four AANA codes mentioned above. The *AANA Code for Advertising and Marketing Communications to Children* was developed in 2003 and reviewed in 2007 'following a period of public consultation', with the revised code issued in May 2008.<sup>15</sup> This Code was reviewed again in 2012. AANA has said it used the public consultation on the *Code of Ethics* to inform this review.<sup>16</sup> This Code and the *AANA Food and Beverage Code Advertising and Marketing Code* were said to be 'the result of a rapid response by industry to community concerns about food and beverage advertising' and 'developed in consultation with consumer advocacy groups, government, media and

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<sup>6</sup> AANA, 'Promoting, Defending and Evolving Self-Regulation' <<http://aana.com.au/self-regulation/>>.

<sup>7</sup> AANA, Submission in Response to Department of Racing, Gaming and Liquor Review of the *Liquor Control Act 1988* (5 March 2013).

<sup>8</sup> Ibid.

<sup>9</sup> AANA, Submission to Australian Communications and Media Authority Contemporary Community Safeguards Inquiry Issues Paper (July 2013), 10. This resulted in an expanded definition of advertising to include other forms of marketing.

<sup>10</sup> AANA, AANA Code of Ethics Review 2011: Summary of Code Review Consultation by Dr Terry Beed Independent Code Reviewer (May 2011). Dr Beed was a marketing academic at the University of Sydney.

<sup>11</sup> AANA, above n 9.

<sup>12</sup> Ibid.

<sup>13</sup> AANA, 'AANA Evolves Code to Clarify Use of Sexual Appeal in Advertising' (Media Release, 21 September 2007) <<http://aana.com.au/content/uploads/2017/09/Media-Release-AANA-evolves-code-to-clarify-use-of-sexual-appeal-in-advertising.pdf>> .

<sup>14</sup> Ibid. The Outdoor Media Association is the peak body for advertisers who use out-of-home (OOH) advertising.

<sup>15</sup> AANA, above n 9, 8.

<sup>16</sup> AANA, Submission to Inquiry into the Sexualisation of Children and Young People, Parliament of New South Wales, Committee on Children and Young People (February 2016) 4. <<https://www.parliament.nsw.gov.au/ladocs/submissions/52952/Submission%2013%20-%20Australian%20Association%20of%20National%20Advertisers.pdf>>.

advertising'.<sup>17</sup> The latter Code was introduced in 2009 and has been evaluated but not reviewed.

The *Environmental Claims Code* was introduced in 2009, then later evaluated and reviewed, with a new Code published in 2018. AANA has said that there was public consultation on the development of the Code and on its review,<sup>18</sup> but the only information on this is an undated statement on the AANA website saying 'If you would like to be included in the consultation, or would like to join the Public & Regulatory Affairs Committee, please get in touch with the Self-Regulatory team.'<sup>19</sup>

The *Wagering Advertising and Marketing Communications Code* was developed in 2015 with the release of an issues paper. A period of six weeks was allowed for public consultation, following which the Code was drafted by AANA and released in 2016. The issues paper invited written comments (by mail or email) and also said consultation would be undertaken through 'discussions between interested stakeholders and the AANA'.<sup>20</sup>

Apart from the statement on the AANA website for the *Environmental Claims Code*, it is not apparent what is meant by 'consumer consultation'.

Although the *Summary of Code Review Consultation* for the *Code of Ethics* prepared in 2011 as part of Dr Beed's review referred to an AANA Political and Ethics Committee, this appears to have been replaced by a Self-Regulation Committee through which 'the AANA promotes a unified voice for brands to Federal and State Governments'.<sup>21</sup> The Committee is comprised of industry representatives, but there is no information on its procedures.

It should also be noted that Ad Standards conducts research on community standards and this can be seen as a complement to AANA consultation. Ad Standards has noted that the organisation uses a market research firm to survey around 1,200 people each year to give a nationally representative picture of the public's views on the decisions of its community standards panel which decides complaints under the AANA *Code of Ethics*. A representative explained: 'We'll actually ask them what they think about the different provisions of the *Code of Ethics*, whether they think they're suitable or inadequate and whether they think that what we do is actually useful.' Although this aspect of consultation is conducted by the complaints body, Ad Standards feeds the results back to the rule-making body: 'all that data is all the information that we give to the AANA ... when they're doing their code reviews.'<sup>22</sup>

As an example, the 2012 Community Perceptions Research involved an online survey of 1,253 participants<sup>23</sup> and in 2017 12 face-to-face focus groups across Australia were conducted.<sup>24</sup> AANA Chief Executive Officer John Broome has explained the connection between Ad Standards research and the *Code of Ethics*:

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<sup>17</sup> Ibid.1

<sup>18</sup> AANA, above n 4.

<sup>19</sup> AANA, <<http://aana.com.au/code-review-environmental-claims-in-advertising-and-marketing/>>.

<sup>20</sup> AANA, above n 4. See *AANA Discussion Paper: AANA Wagering Advertising and Marketing Communications Code* (November 2015) 3 <<http://aana.com.au/content/uploads/2015/11/151105-Discussion-paper-AANA-Wagering-Advertising-Marketing-Code.pdf>>.

<sup>21</sup> AANA, 'Self-Regulation Committee' <<http://aana.com.au/self-regulation/self-regulation-committee/>>.

<sup>22</sup> These comments were made by the Ad Standards representative who attended the Regulator Round Table conducted for this project on 9 May 2019.

<sup>23</sup> ASB, *Community Perceptions 2012* (June 2012). Ad Standards commissioned Colmar Brunton Social Research to conduct the survey.

<sup>24</sup> ASB, *Community Perceptions: 2017* (December 2017).

When the ASB conducted extensive community research recently to evaluate the extent to which Advertising Standards Board determinations aligned with broader community opinion, it emerged that clause 2.2 could be drafted in such a way to improve alignment with community standards.<sup>25</sup>

In 2018 AANA commenced additional research by developing an AANA/Ipsos Advertising Sentiment Index on community perceptions of advertising. The first set of results was issued later in 2018 in order to 'help inform the AANA's advertising self-regulatory code development agenda'.<sup>26</sup>

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<sup>25</sup> AANA, above n 13.

<sup>26</sup> AANA, above n 4.

# Australian Broadcasting Corporation (ABC) Code of Practice

## A. Development of Codes

The process for revising the ABC *Code of Practice* (the Code) is initiated by the ABC Board, which has a duty to develop and notify codes of practice to the Australian Communications and Media Authority (ACMA) in accordance with the *Australian Broadcasting Corporation Act 1983* (Cth) (ABC Act).<sup>1</sup> Revisions to the Code typically occur after the ABC Board completes a review of its editorial policies,<sup>2</sup> however, the ABC Board will ask ABC staff to revise the code in response to suggestions made by ABC staff and management; complaints received from viewers and other members of the public; recommendations made by the ABC's Advisory Council (AC) or its Bonner Committee; recommendations (if any) made by ACMA after investigating complaints about the ABC from individuals and organisations; or otherwise at its own request.<sup>3</sup>

If ABC staff are asked by the ABC Board to revise the code, they consider the ABC's existing editorial policies and review any existing and relevant research. They analyse the complaints data concerning content broadcast by the ABC on television and/or radio. They evaluate recommendations made by ACMA (if any) following its investigations of complaints about ABC programming submitted by viewers and others. They also determine approach(es) adopted by other television and radio broadcasters within Australia and worldwide.<sup>4</sup> After information is gathered, a discussion paper, which includes proposed new rules and rationales for their adoption, is then prepared and circulated within and outside of the ABC for discussion and written comment. When consultation is finished, relevant ABC staff will collate the feedback of viewers and others and modify proposed rules (as appropriate). The ABC Board must approve all changes made to the Code.

## B. Consumer and citizen engagement

Community consultation is primarily the responsibility of the AC. Established in 1983 in accordance with the ABC Act,<sup>5</sup> the AC consists of 12 members, each of whom is appointed by the ABC Board and may serve for up to four years. Each member represents a particular constituency, including Indigenous, faith-based, and immigrant groups. There are currently six male and six female members of the AC. The function of the AC is to advise the ABC Board (either on its own initiative or at the request of the Board) on all matters relating to television and radio programming.

When significant changes (ie, changes that are not minor or routine) to the Code are proposed, the ABC Board asks the AC to consult with the public about its content. Members of the AC are then asked to solicit the views of their respective constituencies and to provide a written report to the AC. Members of the AC are not obliged to consult with their

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<sup>1</sup> *Australian Broadcasting Corporation Act 1983* (Cth) (ABC Act) s 8(1)(e).

<sup>2</sup> Michael Millett (Director of Corporate Affairs, ABC), Submission to ACMA, *Contemporary Community Safeguards Inquiry* (19 July 2013) 2.

<sup>3</sup> See eg, Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Operations of Codes of Practice in the Television Industry*, Parliament of Australia, Canberra, 18 May 1995, 78-81 (Pauline Garde, General Manager, Corporate Policy and Planning, ABC).

<sup>4</sup> *Ibid*; Submission to ACMA, above n 2, 2.

<sup>5</sup> ABC Act s 11.

constituencies in a specific way: they are free to determine the manner in which they consult with their constituencies. However, the chosen method of consultation must be lawful; and if AC members wish to conduct an online survey, they must obtain the prior permission of the ABC's Secretariat. The ABC's website lists the following as possible methods of consultation: one-on-one interviews, questionnaires, online surveys (such as Survey Monkey), informal meetings and 'structured community events',<sup>6</sup> but no further advice or commentary is provided about how each of these should be conducted and/or how often each of these is used. It also could not be determined which organisations and/or individuals are consulted or if members of the AC use methods of consultation not specified on this list. It is noted, for example, that when the ABC reviewed its self-regulation framework, including code development, in 2009, it published an issues paper on its website, and solicited written submissions from the public. It also placed ads in major newspapers throughout Australia. In total, 28 submissions were received.<sup>7</sup> Regardless of the methods chosen by AC members, the ABC Board is required to 'have regard to' any advice provided by the AC.<sup>8</sup> The Board may also ask the AC to carry out supplementary community consultation.

In addition to the AC, the ABC Board will seek input on the Code from the members of its Bonner Committee. This committee is an internal advisory and representative body on matters relating to Aboriginal and Torres Strait Islander content and communities. Members of the committee consist of Indigenous and non-Indigenous members of ABC staff and are from geographically diverse parts of Australia.<sup>9</sup>

The ABC has also established a large panel of audience members and solicits its views on programming matter.<sup>10</sup> These views are fed into the code development process.

If proposed changes to the Code are minor or routine, the ABC Board may not engage in the full-scale public consultation process described above. In addition, the ABC has noted that it does not release a draft version of its Code for public comment. The ABC has explained that 'the ABC *Code of Practice* is effectively a subset of the ABC's Editorial Policies and is thus subject to the processes that lead to their periodic refinement and review'.<sup>11</sup>

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<sup>6</sup> ABC, 'ABC Advisory Council – Member Obligations' <<http://about.abc.net.au/who-we-are/abc-advisory-council/>>.

<sup>7</sup> ABC, *Review of the ABC's Self-Regulation Framework* (September 2009) 8-9.

<sup>8</sup> ABC Act s 11(12).

<sup>9</sup> ABC, *Investing in Audiences: Annual Report 2017* (2017) vol II, 62-3.

<sup>10</sup> This information was provided by an ABC representative at the Industry Round Table held for this project on 10 May 2019.

<sup>11</sup> Email from ABC representative to Karen Lee, 21 October 2019.

# Australian Data-driven Marketing and Advertising (ADMA) Code of Practice

Formerly known as the Australian Direct Marketing Association, the Association for Data-driven Marketing and Advertising (ADMA) is one of four 'organisations'<sup>1</sup> of Australian Alliance for Data Leadership Limited (AADL), a company limited by guarantee.<sup>2</sup> ADMA is the 'principal industry body for data-driven marketing and advertising'.<sup>3</sup> It is led by an Advisory Committee, which reports to the AADL Board. Members of ADMA consist of entities, approved by AADL, that 'carry on business or [are] engaged in the data-driven marketing and advertising industry' in Australia or elsewhere, and they are required to comply with the *ADMA Code of Practice* (the Code).<sup>4</sup> Allegations of non-compliance with the Code by ADMA members, made by complainants, are heard and adjudicated by the AADL Code Authority<sup>5</sup> – a body comprised of an Independent Chair, three consumer representatives and three industry representatives.<sup>6</sup> Subject to the agreement of non-ADMA members, the AADL Code Authority may also hear and adjudicate allegations of non-compliance made by complainants where they have not been able to resolve their complaints with non-ADMA members.<sup>7</sup>

## A. Development of Code of Practice

The first version of the Code was drafted in 1998 and ADMA's adoption of it was authorised by the Australian Competition and Consumer Commission (ACCC) on 16 August 1999 until 16 August 2003 pursuant to s 88(1) of the then *Trade Practices Act 1974* (Cth).<sup>8</sup> ADMA revised the Code in 2003 and the ACCC granted ADMA an interim authorisation with respect to the 2003 Code on 13 August 2003.<sup>9</sup> ADMA made further amendments to the code in 2004, 2005 and 2006, and on 29 June 2006, the ACCC granted ADMA an authorisation for the 2006 version of the Code until 30 September 2009, subject to the condition that ADMA regularly reviews its Code and reports its findings to the ACCC.<sup>10</sup> The Code was not updated again until 2018.<sup>11</sup> Whether ADMA intended to submit the 2018 Code to the ACCC for authorisation under the *Competition and Consumer Act 2010* (Cth) could not be determined.

The procedures followed by ADMA to review and formulate the Code also could not be determined. The ACCC's determination of 29 June 2006 states that the 2006 version of the Code included provisions for code review and amendment, stipulating that the Code was: 'subject to independent review on a regular basis, with the review body (not being the Code

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<sup>1</sup> The other organisations are the Digital and Technology Collective (formerly the Australian Interactive Media Industry Association), the Institute of Analytics Professionals of Australia (IAPA) and Data Governance Australia (DGA).

<sup>2</sup> Constitution of Australian Alliance for Data Leadership Limited cl 9.2.

<sup>3</sup> ADMA, 'About ADMA' <<https://www.adma.com.au/about>>.

<sup>4</sup> AADL Constitution, above n 2, cl 2.2.

<sup>5</sup> ADMA, *Code Authority Charter* (1 September 2015) cl 2.1(1).

<sup>6</sup> ADMA, *Code of Practice* (2018) 2. See also AADL Constitution, above n 2, cl 17.

<sup>7</sup> ADMA *Code Authority Charter*, above n 5, cl 2.1(1)-(2).

<sup>8</sup> ACCC, *Determination: Application for Revocation of Authorisation A40077* and its substitution by Authorisation A90876 lodged by the Australian Direct Marketing Association Limited in relation to its 2006 *Direct Marketing Code of Practice* (29 June 2006) 12.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* i.

<sup>11</sup> ADMA, 'ADMA Code of Practice: Questions and Answers 1' <<https://www.adma.com.au/compliance/code-of-practice>>. For the current version of the code, see ADMA, *Code of Practice*, above n 6.

Authority) to consist of an Independent Chair and an equal number of industry and consumer/community representatives'; and 'in conducting a review of the Code, the review body should, where appropriate, consult with groups affected by the Code'.<sup>12</sup> However, the procedures used to draft the 2018 Code and the 1998 Code, authorised by the ACCC, were most likely different from those used to draft the 2006 Code. For example, the *ACCC Journal* states that, 'In November 1997 the Ministerial Council on Consumer Affairs approved the release of a Model Code of Practice for the Direct Marketing Industry [produced by ADMA]'.<sup>13</sup> Other information also indicates that the 1998 code was prepared in consultation with the Ministerial Council of Consumer Affairs (MCCA), the ACCC and consumer and business groups,<sup>14</sup> but consumer organisations were not members of the body that developed the Code.<sup>15</sup> Moreover, an ADMA media release issued on 13 February 2018 relating to the publication of the 2018 Code states the Code Authority undertook a review of the ADMA Code of Practice during 2017.<sup>16</sup> The 2018 Code and charter of the Code Authority dated 1 September 2015 do not include any provisions addressing code review and revision, although the AADL Constitution states any changes to the ADMA Code of Practice must be approved by a two-thirds majority of the directors of the AADL Board after consultation with the members of ADMA.<sup>17</sup>

## B. Consumer and citizen engagement

ADMA appears at a minimum to consult consumer organisations when its Code is redrafted: there are references to the release of an issues papers for its stakeholders,<sup>18</sup> and information about the 2018 Code on ADMA's website states, 'we have consulted extensively with members, government regulators and consumer bodies over a two-year period to ensure we are taking the Code in the right direction.'<sup>19</sup> However, no information could be located about when consultation occurs (eg, at the outset, during and/or at the end of code review etc.); the form consultation takes (eg, an opportunity to submit written comments, face-to-face meetings etc.); the means ADMA uses to advertise any consultation opportunities; the duration of consultation; or the number of consumer organisations and private individuals that participate during consultation.

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<sup>12</sup> *ACCC Determination*, above n 8, 21.

<sup>13</sup> ACCC, 'Adjudication: Draft Determination' (1998) 17 *ACCC Journal* 29, 29.

<sup>14</sup> ADMA, 'About the ADMA Code Authority' <<https://www.adma.com.au/compliance/code-authority/about>>.

<sup>15</sup> Chris Field, 'Codes of Conduct: The New Face of Consumer Protection' (1999) 24(3) *Alternative Law Journal* 157.

<sup>16</sup> ADMA, 'ADMA Code of Practice 2018 Released' (Media Release, 13 February 2018) <<https://www.adma.com.au/compliance/adma-code-of-practice-2018-released>>.

<sup>17</sup> *AADL Constitution*, above n 2, cl 17.5(b).

<sup>18</sup> See, eg, Harrison Polites, 'ADMA Set to Update Marketing Code of Practice' *The Australian Business Review* (online), 9 July 2013 <<https://www.theaustralian.com.au/business/business-spectator/adma-set-to-update-marketing-code-of-practice/news-story/2f61b3aaff0fac6578381193e62d810d>>.

<sup>19</sup> ADMA, 'ADMA Code of Practice: Questions and Answers 4' <<https://www.adma.com.au/compliance/code-of-practice>>.

## Australian Food and Grocery Council (AFGC)

The Australian Food and Grocery Council (AFGC) is the leading national organisation representing Australia's food, drink and grocery manufacturing industry.<sup>1</sup> Its membership is made up of over 150 companies,<sup>2</sup> including Coca-Cola, Kellogg and Arnott's.<sup>3</sup>

The advertising and marketing of food and beverage products in Australia fall under a range of self-regulatory codes including:

- *AANA Code of Ethics*
- *AANA Food and Beverages Advertising and Marketing Communications Code*
- *AANA Code for Advertising and Marketing Communications*
- *AFGC Quick Service Restaurant Initiative (QSRI) for Responsible Advertising and Marketing to Children*
- *AFGC Responsible Children's Marketing Initiative (RCMI) for the Australian Food and Beverage Industry.*

Summaries of AFGC QSRI and AFGC RCMI are provided below.

### A. Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children (QSRI)

#### 1. Development of QSRI

The QSRI provides a common framework for quick service restaurant companies. It is designed to promote healthier food and beverage products in marketing directed to children.<sup>4</sup>

Companies voluntarily sign up to the QSRI. If a company signs up to the QSRI, it is required at a minimum to develop and publish its own individual Company Action Plan, outlining how it will meet the core principles of the Initiative.<sup>5</sup> Attached to the QSRI is a uniform set of nutrition criteria to define 'children's meals', with only products that meet these criteria permitted to be advertised to children. The criteria were developed by a team of Accredited Practising Dietitians in consultation with national guidelines and authorities on children's nutrition.<sup>6</sup> At the time of writing there were seven signatories to the QSRI.<sup>7</sup>

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<sup>1</sup> AFGC, *Position Statement – In Response to: Responsible Advertising to Children: An Independent Review of the Australia Food and Beverage Industry Self-Regulatory* (1 November 2012).

<sup>2</sup> AFGC, Submission to Department of Health and Aging & Department of Finance and Deregulation, *Review of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS)*, June 2012.

<sup>3</sup> AFGC, *2015 Annual Report* (2015) <<https://www.afgc.org.au/download/afgc-annual-report-2015-final-pdf>>.

<sup>4</sup> AFGC, *Australian Quick Service Restaurant Industry Initiative For Responsible Advertising and Marketing to Children 2011 Compliance Report* (2011).

<sup>5</sup> AFGC, *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children ('QSRI 2018')* (March 2018) 5 <<https://www.afgc.org.au/industry-resources/rcmi-and-qsri>>.

<sup>6</sup> AFGC, above n 4.

<sup>7</sup> AFGC, 'Advertising to Children' <<https://www.afgc.org.au/industry-resources/rcmi-and-qsri>>.



Complaints under the RCMI are administered by Ad Standards.<sup>8</sup> An independent arbiter will advise Ad Standards whether the product or meal advertised represents a 'healthy dietary choice'.<sup>9</sup>

The QSRI became effective on 1 August 2009.<sup>10</sup>

## 2. Consumer and citizen engagement

There does not appear to be any publicly available formal policy on consumer and public consultation. The creation of the QSRI resulted from the collaboration between Australia's main quick service restaurants ('The AFGC Quick Service Restaurant Forum') in consultation with the AANA.<sup>11</sup> At the time, the AFGC Quick Service Restaurant Forum was comprised of McDonald's, Hungry Jacks, Yum! Restaurants International (KFC and Pizza Hut), and QSR Holdings (Red Rooster, Oporto, Chicken Treat).<sup>12</sup> Subway later joined the Forum.<sup>13</sup> The food industry did not consult with government, consumers, public health advocates or other affected stakeholders when developing the code.<sup>14</sup>

The AFGC prepares a compliance report each year. The report details the results of a three-month compliance audit of television advertising it conducts each year and the complaints concerning the RCMI (if any) adjudicated by Ad Standards during the previous 12 months; however, the actual operation of the code has only been reviewed once since it was introduced.<sup>15</sup>

In 2012, three years after the QSRI was introduced, the AFGC commissioned an independent review of the operation of the QSRI and RCMI.<sup>16</sup> It found that both QSRI and RCMI were managed only by dedicated staff within the AFGC. Among several recommendations made, the review recommended establishing a 'code administration committee', representative of all stakeholder groups including signatories, consumers and regulatory affairs representatives, to oversee the direction and development of the QSRI into the future and to provide transparency to the scheme (Recommendation 10).<sup>17</sup>

In response to some recommendations made in the 2012 review, an updated version of the QSRI was released in January 2014.<sup>18</sup> It is not apparent whether there was consultation on

<sup>8</sup> Ad Standards, 'Food & Beverage Advertising' <<https://adstandards.com.au/products-issues/food-beverage-advertising>>.

<sup>9</sup> The independent arbiter for AFGC Initiatives at the time of writing was Associate Professor Jon Buckley, Director, Nutritional Physiology Research Centre, University of South Australia.

<sup>10</sup> AFGC, 'Advertising to Children', above n 4.

<sup>11</sup> Ibid.

<sup>12</sup> AFGC, *In Response to: Healthy Kids Association Incorporated – Final Report on the Compliance of Signatories to the Australian Quick Service Restaurant Industry Initiative for Responsible Advertising to Children* (2012).

<sup>13</sup> AFGC, Submission to Queensland Government Department of Health, *Fast Choices Kilojoule Menu Labelling* (2015) 3 <<https://www.afgc.org.au/wp-content/uploads/2015/10/AFGC-Submission-to-Queensland-Health-Fast-Choices-Kilojoule-Menu-Labelling.pdf>>.

<sup>14</sup> Belinda Reeve, 'Self-Regulation of Food Advertising to Children: An Effective Tool for Improving the Food Marketing Environment?' (2016) 42(2) *Monash University Law Review* 419, 444.

<sup>15</sup> For recent compliance reports, see AFGC, 'Advertising to Children', above n 7.

<sup>16</sup> Susannah Tymms, *Responsible Advertising to Children: An Independent Review of the Australian Food and Beverage Industry Self-Regulatory Codes* (Independent Review, October 2012). Ms Tymms is a consultant working in agriculture, biotechnology and food policy, <[https://ifballiance.org/uploads/ifbaResource/report/59edac4f2262b\\_print%20final%20responsible%20advertising%20to%20children%20oct%202012.pdf](https://ifballiance.org/uploads/ifbaResource/report/59edac4f2262b_print%20final%20responsible%20advertising%20to%20children%20oct%202012.pdf)>.

<sup>17</sup> Ibid, Recommendation 10.

<sup>18</sup> *AFGC Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children* (January 2014). Note: this reference is to the 2014 version of the RCMI. The AFGC's website does not contain the 2014 version of the code, but a reference to it can be found in the footnotes of Belinda Reeve, 'Self-Regulation of Food Advertising to Children: An effective Tool for Improving the Food Marketing Environment?', above n 14, 429.

these changes, other than the input from the independent reviewer, or how these changes were adopted (eg, by way of a working group).

The updated version included the introduction of an 'Initiative Administration Arrangement' in accordance with Recommendation 10 of the 2012 review.<sup>19</sup> Under this arrangement, the 'Initiative Administration Manager' coordinates the management of the RCMI, with assistance from the 'Initiative Administration Committee'. The Committee is responsible for overseeing the periodic review of the QSRI and amendments as required. It meets quarterly and its membership comprises of five members including a Chair (AFGC Board member or delegate), two industry representatives (one from the RCMI signatories, and one from the QSRI signatories), as well as two external stakeholders. Members are selected and appointed by the Initiative Administration Manager. Each member is appointed for a period of two years and may nominate for re-appointment upon completion of this period.<sup>20</sup> There is no information available indicating who the two current external stakeholder members of the Initiative Administration Committee are.

The QSRI was again updated in March 2018 and has retained the Initiative Administration Arrangement described above.<sup>21</sup> However, no information is available on consultation conducted for this update and it does not appear that any media release was published advising the public of the 2018 changes or the nature of the changes. It is assumed that the Initiative Administration Committee guided the process of updating QSRI; however there is no information available to confirm this.

## B. Responsible Children's Marketing Initiative for the Australian Food and Beverage Industry (RCMI)

### 1. Development of RCMI

The RCMI was developed in collaboration with the Australian Associate of National Advertisers (AANA)<sup>22</sup> and builds upon the existing AANA Codes by restricting the type of food and beverage products that can be advertised to children to those that are 'healthier dietary choices'. The RCMI contains key principles relating to:

- advertising messaging
- use of popular personalities and licenced characters
- product placement
- use of products in interactive games
- advertising in schools
- use of premium offers.

Companies voluntarily sign up to the RCMI. If a company signs up to the RCMI, it is required at a minimum to develop and publish its own individual Company Action Plan, outlining how

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<sup>19</sup> Ibid 4.1.

<sup>20</sup> AFGC, *QSRI 2018*, above n 5, Schedule 3.

<sup>21</sup> Ibid, Schedule 2.

<sup>22</sup> AFGC, *Responsible Children's Marketing Initiative ('RCMI 2018')* (March 2018) <<https://www.afgc.org.au/industry-resources/rcmi-and-qsri>>.

it will meet the core principles of the Initiative.<sup>23</sup> At the time of writing there were 18 signatories to the RCMI.<sup>24</sup>

Complaints under the RCMI are administered by Ad Standards.<sup>25</sup> An independent arbiter will advise Ad Standards whether the product or meal advertised represents a 'healthy dietary choice'.<sup>26</sup>

The RCMI was launched in October 2008 and came into effect on 1 January 2009.<sup>27</sup>

## 2. Consumer and citizen engagement

There does not appear to be any publicly available formal policy on consumer and public consultation. According to an interview with an AFGC representative, conducted by Belinda Reeve in 2011, the AFGC formed a working group with its member companies to develop the RCMI's core principles and definitions.<sup>28</sup> The food industry did not consult with government, consumers, public health advocates or other affected stakeholders when developing RCMI.<sup>29</sup>

The AFGC prepares a compliance report each year. The report details the results of a three-month compliance audit of television advertising it conducts each year and the complaints concerning the RCMI (if any) adjudicated by Ad Standards during the previous 12 months,<sup>30</sup> however, the actual operation of the code has only been reviewed once since it was introduced.

In 2012, three years after the RCMI was introduced, the AFGC commissioned an independent review of the operation of the RCMI and QSRI.<sup>31</sup> It found that both QSRI and RCMI were managed only by dedicated staff within the AFGC. Among several recommendations made, the review recommended establishing a 'code administration committee', representative of all stakeholder groups including signatories, consumers and regulatory affairs representatives, to oversee the direction and development of the RCMI into the future and to provide transparency to the scheme (Recommendation 10).<sup>32</sup>

In response to some recommendations made in the 2012 review, an updated version of the RCMI was released on 1 January 2014.<sup>33</sup> It is not apparent whether there was consultation on these changes, other than the input from the independent reviewer, or how these changes were adopted (eg, by way of a working group).

The updated version included the introduction of an 'Initiative Administration Arrangement' in accordance with Recommendation 10 of the 2012 review.<sup>34</sup> Under this arrangement, the

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<sup>23</sup> The Communications Council, 'Core Principles' <<https://www.communicationscouncil.org.au/public/content/ViewCategory.aspx?id=890>>.

<sup>24</sup> AFGC, 'Advertising to Children', above n 7.

<sup>25</sup> Ad Standards, 'Food & Beverage Advertising', above n 8.

<sup>26</sup> See n 9.

<sup>27</sup> AFGC, *Responsible Children's Marketing Initiative 2010 Compliance Report* (2010) <[https://ifballiance.org/uploads/ifbaResource/report/59e4b5cc3d186\\_rcmi%20compliance%20report%202010.pdf](https://ifballiance.org/uploads/ifbaResource/report/59e4b5cc3d186_rcmi%20compliance%20report%202010.pdf)>.

<sup>28</sup> Reeve, above n 14.

<sup>29</sup> Ibid.

<sup>30</sup> For recent compliance reports, see AFGC, 'Advertising to Children', above n 7.

<sup>31</sup> Tymms, above n 16.

<sup>32</sup> Ibid Recommendation 10.

<sup>33</sup> See n 18.

<sup>34</sup> AFGC, *RCMI 2018*, above n 22, 4.1.

'Initiative Administration Manager' (an employee of the AFGC) is responsible for coordinating the management of the RCMI, with assistance from the 'Initiative Administration Committee'. The Committee is responsible for overseeing the periodic review of the RCMI and amendments as required. It meets quarterly and its membership comprises of five members including; a Chair (AFGC Board member or delegate), two industry representatives (one from the RCMI signatories, and one from the QSRI signatories), as well as two external stakeholders. Members are selected and appointed by the Initiative Administration Manager. Each member is appointed for a period of two years and may nominate for re-appointment upon completion of this period.<sup>35</sup> There is no information available indicating who the two current external stakeholder members of the Initiative Administration Committee are.

The RCMI was again updated in March 2018 and has retained the Initiative Administration Arrangement described above.<sup>36</sup> However, no information is available on consultation conducted for this update and it does not appear that any media release was published advising the public of the 2018 changes or the nature of the changes. It is assumed that the Initiative Administration Committee guided the process of updating the Code; however there is no information available to confirm this.

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<sup>35</sup> Ibid, Schedule 2.

<sup>36</sup> Ibid.

# Australian Narrowcast Radio Association (ANRA) Open Narrowcast Codes of Practice

The Australian Narrowcast Radio Association (ANRA) is the ‘peak industry body representing Low Power Open Narrowcast (LPON) Radio services and the High Power Open Narrowcast (HPON) Radio services located across all States and Territories of Australia.’<sup>1</sup> Its *Open Narrowcast Radio Codes of Practice* (the Codes) were last amended and registered by the Australian Communications and Media Authority (ACMA) in accordance with Part 9 of the *Broadcasting Services Act 1992* (Cth) (the BSA) in 2011.<sup>2</sup>

The BSA stipulates that before ACMA can register a code, it must be satisfied that (i) the code provides appropriate community safeguards for the matters covered by the code; (ii) the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and (iii) members of the public have been given an adequate opportunity to comment on the code. If ACMA is satisfied that each of the three requirements is met, it must register the code.<sup>3</sup>

## A. Development of Codes

ANRA has advised that the Codes were developed in consultation with ACMA, narrowcast operators (via meetings and email), legal counsel and members of the public who were invited to comment on draft Codes. Codes of practice developed by other groups representing sections of the broadcasting industry and registered by ACMA under Part 9 of the Act were used as a starting point with appropriate modifications made.<sup>4</sup>

ANRA has also advised that the Codes are reviewed by the ANRA Board from time to time – the ANRA website suggests every three years<sup>5</sup> – ensuring they remain current. However, no changes have been necessary since the Codes were registered in 2011.<sup>6</sup>

## B. Consumer and citizen engagement

As stated above, the BSA requires that ACMA must be satisfied that members of the public have been given an adequate opportunity to comment on a Part 9 code of practice before it can be registered. It appears that ANRA provided members of the public with an opportunity to submit written comments on its draft Codes in order to satisfy ACMA. ACMA usually requires the provision of such an opportunity before it will register Part 9 codes of practice developed by groups representing sections of the broadcasting industry.

Additional information could not be located on the public record, despite searching media releases and annual reports; submissions made since 1993 to ACMA and its predecessor, the Australian Broadcasting Authority (ABA) as well as other material on the regulators’ websites; and relevant reports of Parliamentary committees and evidence presented to them. ANRA itself has noted that it is not possible to provide a greater amount of detail as

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<sup>1</sup> ANRA, ‘About ANRA’ <[www.anra.org.au](http://www.anra.org.au)>.

<sup>2</sup> ANRA, ‘Codes of Practice’ <[www.anra.org.au](http://www.anra.org.au)>.

<sup>3</sup> *Broadcasting Services Act 1992* (Cth), s 123(4).

<sup>4</sup> Email from ANRA representative to Rosa Alice (UTS), 8 June 2018.

<sup>5</sup> Codes of Practice, above n 2.

<sup>6</sup> Email from ANRA representative, above n 4.

the people involved in drafting the Codes are no longer part of ANRA and there is no access to the relevant documentation relating to the development of the Codes.<sup>7</sup> In relation to current practice, ANRA has noted that when developing its Codes, it will take account of relevant research into the experience of listeners and viewers and others carried out by regulators or agencies such as ACMA, the Office of the Australian Privacy Commissioner and the Australian Law Reform Commission. It has also noted that it requires its members to make a weekly announcement about the existence of the Codes and the processes viewers and/or listeners must follow to make a complaint.<sup>8</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Information provided by an ANRA representative during the Industry Round Table held for this project on 10 May 2019.

# Australian Press Council (APC) Principles, Standards and Guidelines

## A. Development of Codes<sup>1</sup>

The Australian Press Council (APC) was formed in 1976 and is an incorporated association. It is funded by fees paid by members. In addition to its standards-setting and complaints-handling roles, it is charged with promoting media freedom. It describes itself as ‘the principal body with responsibility for setting standards and responding to complaints about material in Australian newspapers, magazines, their associated digital outlets, as well as a growing number of online-only publications to develop standard of practice for print media’.<sup>2</sup>

Fee-paying members of the association (publishers, publisher associations and the journalists’ union) are known as ‘constituent bodies’. The governing body (the ‘Council’) comprises an independent Chair and three categories of members: publisher representatives known as ‘constituent members’, public members and independent journalists. Constituent members are nominated by their constituent bodies and formally appointed by the Council. The Chair is appointed by the Council. Public members are appointed by the Council on the Chair’s nomination ‘after public advertisement of vacancies’.<sup>3</sup> Independent journalist members are appointed by the Council.<sup>3</sup> At the end of the 2017 financial year there were 22 members of the Council (10 public members, seven constituent members, four independent journalists and the Chair). There were also 10 people (with industry and community backgrounds) appointed to sit on complaints panels.<sup>4</sup>

The APC develops and administers three categories of standards instruments: two sets of Principles (the *Statement of General Principles* and the *Statement of Privacy Principles*); Specific Standards (*Specific Standards on the Coverage of Suicide*; *Specific Standards on the Contacting Patients*); and 13 non-binding Advisory Guidelines (e.g., *Advisory Guideline on Family and Domestic Violence Reporting*; *Advisory Guideline on Digital Alteration of Images*).

The various standards instruments are adopted by a majority decision of the Council members present at the meeting, thereby involving public members, journalist members and the Chair, as well as industry representatives. An insight into the decision-making process is offered in a comment by the former Chair after the adoption of the most recent revision of the main code (the *Statement of General Principles*) in 2014:

The Council ... did not accept the claim that publishers should ‘own’ the Principles by having a de facto veto over wording. Acceptance would have abdicated the Council’s rights and responsibilities under its Constitution and have contradicted assurances to the recent government-appointed inquiries into media regulation. In the event ... all publisher members supported the new version.<sup>5</sup>

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<sup>1</sup> The term ‘codes’ is used here in a general sense to include the various standards instruments.

<sup>2</sup> APC, *Annual Report 2016-17* (2018) 11.

<sup>3</sup> Eligibility and recruitment are dealt with in cl 11 of the *Constitution of the Australian Press Council Inc.* <[http://www.presscouncil.org.au/uploads/52321/ufiles/APC\\_Constitution\\_15\\_May\\_2018.pdf](http://www.presscouncil.org.au/uploads/52321/ufiles/APC_Constitution_15_May_2018.pdf)>. APC advises there is no requirement for public advertisement for independent journalist vacancies: advice to authors from APC representative, email 13 June 2018.

<sup>4</sup> APC, above n 2, 13-14.

<sup>5</sup> APC, *Annual Report 2013-14* (2015) 3.

## B. Consumer and citizen engagement

There does not appear to be a published policy on consultation in code development, but the APC reports each year in its Annual Report on the consultation it has undertaken in the reporting period. These descriptions of the code development process show public participation varies, but the most commonly-used method appears to be Round Tables. These may comprise a mix of industry and community representatives, or separate consultations may be held for industry and community. The Chair and one or more Council members will usually attend the consultations, along with APC staff.

The consultation process for the current General Principles was described as follows:

The new Principles were the product of more than twelve months of extensive consultation. This included Round Tables and informal meetings around Australia with a wide range of people from the media and broader community, as well as lengthy discussions at five meetings of the Council itself. Publishers were also invited to nominate representatives for ongoing detailed consultation.<sup>6</sup>

Consultation included eight Round Tables in Sydney and Melbourne between February-March 2014. Earlier rounds of consultation on media practice and the application of the General Principles (as part of the 'Standards Project') in the period August-October 2011 included separate community and industry Round Tables in Adelaide, Melbourne, Sydney and Brisbane. Participation from the community sectors included representatives from organisations working in education, health, business, science, religion, law, social services, the environment, employment, unions, sport, information technology, tourism, ethnic communities, local government and consumer protection.<sup>7</sup> Attendance was by invitation and the Council said that more than 100 people participated in that round of consultation.<sup>8</sup>

More recently, the *Advisory Guideline on Family and Domestic Violence Reporting* (March 2016) involved the following consultation process:

The Advisory Guideline was produced after an extensive six-month consultation process, which included Round Tables in three states and a thorough examination of relevant Press Council complaints, similar guidelines by other organisations, and a wide range of research literature. The Round Tables brought together experts from the sector, as well as survivors, police, and senior journalists and editors with experience in such reporting.<sup>9</sup>

In August 2016 the APC held a 'Discussion Day on Standards and Guidelines' in which its members considered topics for inclusion in codes and heard from guest presenters.<sup>10</sup>

Participation in these APC consultation activities is by invitation. There appears to be no formal criteria for selection of invitees, or for the scope of representation sought in the consultation process, other than general interest in the subject matter. The public members of the Council who participate in the process will have satisfied the eligibility criteria in the Constitution, namely, people:

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid 14.

<sup>8</sup> APC, Submission to the Independent Inquiry into Media and Media Regulation (October 2011), 8.

<sup>9</sup> APC, *Annual Report 2015-16* (2017) 22.

<sup>10</sup> APC, *Annual Report 2016-17*, above n 2, 21.



- (i) 'who have not had previous connections involving ownership of, or employment by, the media';<sup>11</sup> or
- (ii) who if they have 'had previous connections involving ownership of, or employment by, the media,' 'the Council considers have not had recent and significant connections of this kind.'<sup>12</sup>

The APC noted how information from its round tables is fed up to the APC Council for the decision whether to adopt new principles, standards and guidelines. A representative observed that round tables 'can be very valuable in moving forward to a useful new perspective'.<sup>13</sup>

It appears the APC does not publish its draft codes for public comment prior to a decision by the Council. The APC advises it does not consider submissions on draft codes, other than comments from members or views gathered in Round Tables or other informal consultations and discussions, which are not made public.<sup>14</sup>

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<sup>11</sup> APC, above n 3, cl 7(2).

<sup>12</sup> Ibid cl 7(5).

<sup>13</sup> Comments made by an APC representative during the Industry Round Table held for this project on 10 May 2019.

<sup>14</sup> Email from APC representative, above n 3.

# Australian Subscription Television and Radio Association (ASTRA) Codes Of Practice

The Australian Subscription Television and Radio Association (ASTRA) resulted from the amalgamation of the Federation of Australian Narrowcasting and Subscription Services (FANSS) and the Confederation of Australian Subscription Television (CAST) in 1997. Information about the way in which ASTRA develops codes of practice for the purposes of Part 9 of the *Broadcasting Services Act 1992* (Cth) (BSA), including the mechanisms used to consult with consumers and the public, is set out below. Information about the manner in which FANSS and CAST developed Part 9 codes of practice is not included in this summary, as it was deemed to be out of date and may not reflect ASTRA's current practices.

## A. Development of Codes

The Board of ASTRA initiates development and review of codes of practice<sup>1</sup> but the process ASTRA uses to develop codes for and on behalf of its members could not be determined from publicly available information. However, it is known that staff of ASTRA review and take into account customer complaint data.<sup>2</sup> They also consult with ASTRA members and liaise with ACMA. The current composition of ASTRA is not known. No information about the Board is provided on ASTRA's website.

## B. Consumer and citizen engagement

ASTRA consults with consumer and public interest organisations and members of the public by inviting them to submit written comments on draft codes. Currently, it publishes draft codes and related notices on its website. It also issues a press release announcing publication of draft codes and posts relevant information on social media sites.<sup>3</sup> Historically, ASTRA placed advertisements in national newspapers.<sup>4</sup> Members of ASTRA used to 'notify' subscribers about codes in their monthly subscriber magazines and via the websites of 'relevant operators and channels'.<sup>5</sup> ASTRA has also directly approached certain Australian organisations and interest groups,<sup>6</sup> but publicly available information does not indicate which organisations and interest groups are or have been contacted. Consumer and public interest organisations and individuals are given 'a reasonable period for submissions' which ASTRA has understood to mean at least six weeks, reflecting the fact that many community groups meet only once a month.<sup>7</sup> However, they were given four weeks to comment on the draft codes implementing new gambling advertising rules.<sup>8</sup> It has been difficult to find information

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<sup>1</sup> There are three codes developed by ASTRA under Part 9 of the BSA that cover various forms of television and radio subscription services: *Subscription Broadcast Television Codes of Practice 2013*; *Subscription Narrowcast Television Codes of Practice 2013*; *Subscription Narrowcast Radio Codes of Practice 2013*.

<sup>2</sup> ASTRA, Submission to ACMA's Inquiry on Contemporary Community Safeguards (15 July 2013) 2.

<sup>3</sup> ACMA, 'New Gambling Advertising Rules During Live Sports' (20 March 2018) <<https://www.acma.gov.au>>.

<sup>4</sup> ASTRA, Submission to Productivity Commission Inquiry on Broadcasting (17 December 1999) 12; ASTRA, Submission to Senate Standing Committee's Inquiry, *The Effectiveness of the Broadcasting Codes of Practice* (2 May 2008) 2.

<sup>5</sup> ASTRA, Submission to Productivity Commission Inquiry on Broadcasting (17 December 1999) 12.

<sup>6</sup> ASTRA, Submission to Senate Standing Committee's Inquiry, *The Effectiveness of the Broadcasting Codes of Practice* (2 May 2008) 2.

<sup>7</sup> ASTRA, Submission to Productivity Commission Inquiry on Broadcasting above n 5, 12.

<sup>8</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 3.

about the number of consumer and public interest organisations who submit written comments. However, public consultation on the codes of practice for subscription narrowcast radio and subscription broadcast and narrowcast television that were registered by ACMA on 7 November 2013 resulted in 18 submissions from consumer organisations and members of the public.<sup>9</sup> The model of consumer and public consultation adopted by ASTRA is based on the one used by ACMA and its predecessor, the Australian Broadcasting Authority.<sup>10</sup> In addition, as a matter of practice, ACMA requires ASTRA to submit copies of all written submissions made by consumer and public interest organisations and members of the public before it will register a Part 9 code. Copies of written submissions are also placed on the ASTRA website (unless otherwise instructed by submitters).<sup>11</sup>

ASTRA has indicated that when developing its codes of practice, it will take account relevant research into the experience of listeners and viewers and others carried out by ACMA, the Office of the Australian Privacy Commissioner and the Australian Law Reform Commission.<sup>12</sup>

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<sup>9</sup> ACMA, 'Improved Community Safeguards in Codes for Subscription Television and Radio Industry' (Media Release 84/2-13, 7 November 2013).

<sup>10</sup> ASTRA, Submission to Productivity Commission Inquiry on Broadcasting (17 December 1999) 12.

<sup>11</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 3.

<sup>12</sup> Information provided by an ASTRA representative during the Industry Round Table held for this project on 10 May 2019.

# Commercial Radio Australia (CRA) Code of Practice

## A. Development of Codes

The Board of Commercial Radio Australia (CRA), formerly known as the Federation of Australian Radio Broadcasters (FARB), initiates development and review of the *Commercial Radio Code of Practice* (the Code) for the purposes of Part 9 of the *Broadcasting Services Act 1992* (Cth). This Part 9 code is said to be ‘jointly develop[ed]’ by CRA and the Australian Communications and Media Authority (ACMA).<sup>1</sup>

ACMA and CRA will take into account any complaints data about CRA members and other members of the radio industry when the Code is developed. After CRA and ACMA agree the terms of a draft code, CRA engages in public consultation,<sup>2</sup> using the methods described below. When public consultation finishes, any comments received are reviewed by CRA and ACMA and they determine if it is appropriate to modify the draft code. CRA then submits the Code to ACMA for registration. As a matter of practice, ACMA requires CRA to submit copies of all written submissions made by consumer and public interest organisations and members of the public before it will register a Part 9 code.<sup>3</sup> It also asks CRA to provide written commentary in response to any written submissions received.<sup>4</sup> ACMA is not permitted to register a Part 9 code unless members of the public have been given an adequate opportunity to comment on the code.<sup>5</sup>

## B. Consumer and citizen engagement

CRA consults with consumer and public interest organisations and members of the public by inviting them to submit written comments on draft CRA Code. It solicits participation by placing advertisements in major newspapers in all states and territories; issuing a press release; providing notices on its social media channels; and adding a copy of the draft Code, an explanatory guide and/or a discussion paper on its website.<sup>6</sup> Publicly available documentation suggests that members of CRA do not inform their listeners of opportunities to comment on draft codes during radio programming. As a matter of practice, ACMA also issues a press release encouraging members of the public to comment on the draft CRA Code. In addition, ACMA’s press release is made available on its website and distributed through its social media accounts.<sup>7</sup>

For the full Code review in 2016, CRA issued a substantial pack of materials including an Explanatory Note containing details about how to make a written submission; an overview of the Code; and an overview of the main proposed changes. Submissions were accepted either by post or by email.

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<sup>1</sup> CRA, Submission to Senate Standing Committee, *Effectiveness of the Broadcasting Codes of Practice* (1 May 2008), 2.

<sup>2</sup> Ibid.

<sup>3</sup> ACMA, ‘New Gambling Advertising Rules During Live Sports’ (20 March 2018) <<https://www.acma.gov.au>>.

<sup>4</sup> Evidence to Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, Canberra, 23 May 2008, ECA 2 (Joan Warner, CEO, CRA).

<sup>5</sup> *Broadcasting Services Act 1992* (Cth) s 123(4)(b).

<sup>6</sup> ACMA, ‘ACMA Registers New Commercial Radio Industry Code of Practice’ (Media Release 5/2017, 9 March 2017) 1; ACMA, ‘New Gambling Advertising Rules During Live Sports’, above n 3.

<sup>7</sup> ACMA, ‘ACMA Registers New Commercial Radio Industry Code of Practice’, above n 6.

CRA typically gives consumer and public interest organisations and individuals six weeks to make written submissions,<sup>8</sup> although it gave them four weeks when the Code was revised to include new gambling advertising rules.<sup>9</sup> Submissions for the 2016 Code review process were due by 28 May 2016, although the length of the consultation period is not apparent from the document.

Rates of participation by the public vary. In 1999, when it revised the Code, 250 listeners throughout Australia requested copies of the draft code and 47 of these listeners made written submissions.<sup>10</sup> In 2003, when it again reviewed the Code, 'less than 50 submissions' were received.<sup>11</sup> There is no publicly available data on the number of submissions to the code review conducted in 2016 or 2017, but CRA has advised that it now receives fewer than 10 submissions in response to the publication of draft codes during the code review process. Very little information about which consumer and public interest organisations and individuals have submitted comments to CRA is publicly available. However, in 2003, the Communications Law Centre and 'parents and citizen associations' submitted comments during public consultation on the Code.<sup>12</sup> It could not be determined if CRA acknowledges receipt of written comments by submitters, subsequently informs them that their comments were accepted or rejected (in whole or part), and/or provides them with an explanation of its decision(s). Unless otherwise instructed by submitters, all submissions received by CRA are published on its website.<sup>13</sup>

CRA has indicated that when it develops its Code, it will take account of relevant research into the experience of listeners and viewers and others carried out by ACMA, the Office of the Australian Privacy Commissioner and the Australian Law Reform Commission.<sup>14</sup>

As a matter of general practice, CRA also requires its members to make a weekly announcement about the existence of the Code and the processes viewers and/or listeners must follow to make a complaint.<sup>15</sup>

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<sup>8</sup> See, eg, FARB, Submission to Senate Select Committee on Information Technologies Self-regulation in the Information and Communications Industries (27 July 1999); Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media* (April 2000) 91; ACMA, above n 1.

<sup>9</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 3.

<sup>10</sup> FARB, above n 8, 1.

<sup>11</sup> Warner, above n 4, ECA 14.

<sup>12</sup> Ibid.

<sup>13</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 3.

<sup>14</sup> Information provided by a CRA representative during the Industry Round Table held for the project on 10 May 2019.

<sup>15</sup> Ibid.

# Communications Alliance

Known as the Australian Communications Industry Forum (ACIF) from 1997 until 2006, Communications Alliance is the primary industry body and industry co-regulatory body in the Australian communications industry. Below, the rules adopted by Communications Alliance, also known as Comms Alliance, and the processes used by them are described. A summary of consumer and public engagement in each rule-making process then follows.

## A. Development of Codes, Standards and other documentation

Communications Alliance develops and publishes five principal types of rules: Codes, Standards, Guidelines, Specifications and Industry Guidance Notes.

Communications Alliance has two types of Codes – those that are registered with the Australian Communications and Media Authority (ACMA) or the eSafety Commissioner and those that remain unregistered. Unregistered Codes are documents that ‘define good industry practice’.<sup>1</sup>

However, most Codes adopted by Communications Alliance have also been registered (and are therefore enforceable) by the ACMA under Part 6 of the *Telecommunications Act 1997* (Cth) (TA) or the eSafety Commissioner under s 38 of the *Interactive Gambling Act 2001* (Cth) (IGA) or Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth) (BSA). Registered Codes effectively act as a form of state regulation, as they are enforceable by a government regulator, and define minimum standards.

Codes registered by the ACMA under Part 6 of the TA are classified into three categories: ‘consumer’, ‘operational’ and ‘technical’. Consumer Codes generally relate to the goods and services that are delivered to customers – the residential customers and small businesses who enter into contracts with providers of telecommunications services for the supply of those services and related goods – and grant some form of rights or protections to them. Operational Codes govern operational relationships, including the ‘interworking of ... “back office” systems, such as inter-operator billing ...’<sup>2</sup> between providers of the communications industry. Technical Codes deal with technical matters, for example in relation to the technical functionalities of networks.

Standards consist of technical standards<sup>3</sup> developed by Communications Alliance for adoption by the ACMA in accordance with the TA.<sup>4</sup> They also include ‘voluntary’ technical Standards developed by Communications Alliance in its capacity as a ‘Standards Development Organisation (SDO)’ accredited by Standards Australia.

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<sup>1</sup> Communications Alliance, ‘Industry Publications’ <<https://www.commsalliance.com.au/Documents/all>>.

<sup>2</sup> ACIF, *Guideline: Development of Self-Regulatory Telecommunications Industry Operations Codes* (March 1998) 6.

<sup>3</sup> When making a technical standard under s 376 of the *Telecommunications Act 1997* (Cth) (‘TA’), ACMA may under s 377 of that Act adopt technical standards approved by Standards Australia or any other body or association. Since 1997, ACMA’s power to formulate technical standards under s 376 has, in effect, been devolved to Communications Alliance. Among other things, technical standards made under s 376 may relate to protecting the integrity of a telecommunications network; protecting the health or safety of persons who operate, work on use services supplied by means of a telecommunications network or facility; ensuring that customer equipment can be used to give access to an emergency call service; or ensuring, for the purposes of the supply of a standard telephone service, the interoperability of customer equipment with a telecommunications network.

<sup>4</sup> Under the terms of the MoU between the ACA and ACIF adopted in 1998, which is still honoured by ACMA and Communications Alliance, Communications Alliance can also develop disability standards for adoption by ACMA under s 380 of the TA. Disability standards prescribe the accessibility features for all customer equipment supplied to the Australian mass market.

Guidelines provide information on good practice in consumer, operational or technical matters. Specifications are technical documents relating to the interconnection of networks. Compliance with Guidelines and Specifications is voluntary.

Industry Guidance Notes (IGNs) provide guidance on matters such as migration of legacy services, carriage service providers in financial difficulty, handling of life threatening and unwelcome communications, and good sales and credit and debt management practices. They are typically published with a Code or Standard, to provide further and more detailed guidance on specific items within the Code or Standard.

The procedure for developing and revising Codes and Standards consists of five phases: (1) a proposal phase; (2) a drafting phase; (3) a public comment phase; (4) a content approval phase; and (5) a process approval phase.<sup>5</sup> During the proposal phase, problems and issues to be addressed in a Code or Standard are identified by the relevant Reference Panel or Advisory Group of Communications Alliance – the standing bodies, comprised of Communications Alliance members, responsible for a specific area of industry activity – and internal approval for Code or Standard development is obtained. The relevant Reference Panel or Advisory Group also determines the members of the Working Committee responsible for drafting the relevant Code or Standard. When carrying out this task, the Reference Panel or Advisory Group is expected to ensure that the composition of the Working Committee is ‘representative’ of interested parties – those ‘who have a stake in or are affected by the subject matter’ of a document.<sup>6</sup> In the drafting phase, the Working Committee drafts the relevant document. In the public comment phase, Communications Alliance publishes on its website a notice inviting members of the public and industry to submit via email, mail or fax written comments on the draft Code or Standard.<sup>7</sup> All comments are subsequently collated and incorporated into a spreadsheet for the review and consideration of Working Committee members. Throughout the drafting and public comment phases, members of the Working Committee work by consensus. During the content approval phase, members of the Working Committee formally vote on whether it should approve the Code or Standard. Assuming a Code or Standard is approved by a Working Committee, the process approval phase begins. During the process approval phase, the Code or Standard is submitted to the Board of Directors of Communications Alliance which decides whether to ‘publish’<sup>8</sup> (or adopt) it. The Board’s principal function in this phase is to assess if ‘due process’ has been achieved and if the document has any ‘shortcomings’.<sup>9</sup> If a problem is found, the Board must direct the Working Committee to address the underlying issue.

The procedure for developing Guidelines and Specifications consists of the proposal, drafting, content approval and process approval phases discussed above. The public comment phase is optional when Guidelines and Specifications are drafted, but is typically used when a Guideline or Specification relates to or is incorporated into a Code or Standard.

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<sup>5</sup> Communications Alliance, *Operating Manual for the Development of Industry Codes, Standards and Supplementary Documents and the Establishment and Operation of Advisory Groups* (June 2007). At the time of writing, the June 2007 version of the Operating Manual was under review.

<sup>6</sup> Ibid cl 2.1.

<sup>7</sup> Communications Alliance, ‘Drafts for Public Comment’ <<https://www.commsalliance.com.au/Documents/public-comment>>.

<sup>8</sup> *Operating Manual*, above n 5, cl 8.1.

<sup>9</sup> Ibid cls 8.1 and 8.3.

IGNs are developed by Communications Alliance Working Committees or working groups, with involvement of other relevant stakeholders as determined by the content of the IGN.

## B. Consumer and citizen engagement

### 1. Part 6 Codes

#### a). Consumer consultation

As described below, the amount of engagement with consumers, the techniques used to consult them, and when consumers are engaged vary depending on the classification of the specific Part 6 Code and whether the relevant Reference Panel or Advisory Group of Communications Alliance believes the Code has a direct effect on consumers.

Communications Alliance has advised us that before a consumer Code is to be developed or revised, the Australian Communications Consumer Action Network (ACCAN) – the peak body representing the interests of Australian communications consumers – is notified by the Industry Consumer Advisory Group (ICAG) which is the Advisory Group responsible for ‘representing and advancing the interests of Communications Alliance members involved in the delivery of services to end users’.<sup>10</sup> ACCAN is also asked to identify its Code-specific concerns and express its views on what needs to be done to address them.<sup>11</sup> Similarly, when a network or operational Code is determined by the relevant Reference Panel or Advisory Group to have an effect on consumers, ACCAN is notified during the proposal phase and its input is solicited. Examples of such Codes include *Handling of Life Threatening and Unwelcome Communications*,<sup>12</sup> *Emergency Call Service Requirements*,<sup>13</sup> *Integrated Public Number Database (IPND)*<sup>14</sup> and *Mobile Phone Base Station Deployment*.<sup>15</sup> While ACCAN may or may not formally be contacted during the proposal phase, depending on whether a Reference Panel or Advisory Group determines a proposed network or operational Code has an effect on consumers, ACCAN is made aware of the proposal or work undertaken by Communications Alliance through quarterly meetings between Communications Alliance and ACCAN.

One or more consumer organisations are always invited by the ICAG to join Working Committees formulating consumer Codes. Consumer organisations are also invited by Reference Panels and Advisory Groups to sit on Working Committees drafting network and operational codes that they determine have an effect on consumers. However, the Working Committees for all other network and operational Codes do not include representatives from consumer organisations, as it is believed that the work of those committees has little direct effect on consumers and usually requires expert knowledge of industry-internal processes and/or network technologies. When ACIF was first established, consumers were invited to sit on all network and operational codes, but this practice was quickly discontinued as

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<sup>10</sup> ACCAN has indicated that ICAG does not always notify ACCAN before consumer Codes are developed. Sometimes ACCAN’s input is sought only during the public comment phase. Email from ACCAN representative to Derek Wilding and Karen Lee, 11 April 2019.

<sup>11</sup> Regulatory bodies such as the ACMA, the Telecommunications Industry Ombudsman and the Australian Competition and Consumer Commission are also contacted at the outset.

<sup>12</sup> Communications Alliance, *Industry Code C525:2017 Incorporating Variation No. 1/2018: Handling of Life Threatening and Unwelcome Communications* (2018).

<sup>13</sup> Communications Alliance, *Industry Code C536:2011: Emergency Call Service Requirements Incorporating Amendment No 1/2015* (2015).

<sup>14</sup> Communications Alliance, *Industry Code C555: Integrated Public Number Database (IPND)* (2017).

<sup>15</sup> Communications Alliance, *Industry Code C564: Mobile Phone Base Station Deployment* (2011).



consumer organisations did not have the technical knowledge or other resources – including capacity – needed to contribute to Working Committee discussion.

Since July 2009,<sup>16</sup> ACCAN has been appointed to consumer Code Working Committees. Other consumer organisation appointed to consumer Code Working Committees include, for example, the Australian Council of Social Services, the Communications Law Centre, Financial Counsellors Association QLD, Internet Society Australia, the MacArthur Community Legal Centre, Legal Aid QLD and Women with Disabilities Australia.

ACCAN has also been appointed to most Working Committees developing network and operational Codes with an effect on consumers, but other bodies such as the Victoria Police, the Australian Communication Exchange and Sutherland Shire Environment Centre have also participated in such Working Committees.<sup>17</sup> It is the practice of Communications Alliance to obtain the input of ACCAN when determining which consumer organisations should be appointed to consumer, operational and network Code Working Committees. ACCAN represents a range of consumer organisations and can (and does) put forward representatives from those organisations to sit on Working Committees.

If consumer and industry Working Committee members cannot reach agreement on specific provisions when a Code is drafted, the Chair of the Working Committee and/or the project manager may intervene using mediation and/or negotiation strategies. If necessary, the use of formal mediation is permitted, although it has not been used since the development of the Consumer Contracts code in 2004.<sup>18</sup> An Independent Chair has been appointed to some consumer Code Working Committees (eg, the 2012 and 2017-2019 *Telecommunications Consumer Protections Code* Working Committees). For all other Code Working Committees, the Chair is selected by the members of the Working Committee.

It should also be noted that the ACMA is often a non-voting member of Working Committees (for all types of Codes). This means that a staff member of the ACMA takes an active part in Working Committee meetings but does not have voting rights. Similarly, the ACCC and/or the Department of Communications and the Arts (DOCA) may take part in Working Committee processes as an ‘observer’. Irrespective of the ACMA’s involvement on Working Committees, Communications Alliance often consults with ACMA management and/or the ACMA Authority throughout the Code/Standard development process. Communications Alliance may ask members of the ACMA’s Consumer Consultative Forum (CCF) for feedback on Codes and other documents that affect consumers. The CCF is an advisory group that consists of the ACMA, up to eight representatives from Australian consumer organisations, ACCAN, Communications Alliance, the Australian Mobile Telecommunications Association and the Telecommunications Industry Ombudsman.<sup>19</sup> Communications Alliance typically does not present network and operational Codes that do not affect consumers to the CCF.

#### **b). Public consultation**

Public consultation for Part 6 Codes always involves Communications Alliance placing a notice, on its website, inviting members of the public (and industry) to submit via email, mail

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<sup>16</sup> ACCAN was established in July 2009.

<sup>17</sup> See, eg, the *Emergency Call Service Requirements* code, above n13, 32, and the *Mobile Phone Base Station Deployment* code, above n 15, 69.

<sup>18</sup> ACIF, *Industry Code: ACIF C620: Consumer Contracts* (2005).

<sup>19</sup> ACMA, *Consumer Consultative Forum: Terms of Reference* (June 2018) 2.

or fax written comments on the draft Code.<sup>20</sup> Notices are also included in the weekly *We Communicate* newsletter (to which anyone may subscribe for free), sent to key stakeholders, and are published on social media. Typically, Communications Alliance provides all interested parties with a minimum of 30 calendar days in which to make a submission. In addition, since 2009, Communications Alliance notifies ACCAN about all draft Codes, and ACCAN is expected to draw them to the attention of its members where necessary and appropriate. Copies of all submissions received by Communications Alliance (if any) are generally provided to Working Committee members. In addition, comments are collated and incorporated into a spreadsheet for the review and consideration of Working Committee members. Moreover, since 2014, all submissions received are made publicly available on Communications Alliance's website unless the submitter requests otherwise due to the inclusion of confidential or commercially sensitive material in the submission.<sup>21</sup>

Communications Alliance procedures do not require acknowledgement or the provision of comments in response to all submissions made by individuals and other organisations, but as a general rule, Communications Alliance provides a response to all consumer organisations and other private individuals who submit comments. Rates of participation by individual members of the public are generally low, although they vary depending on the specific Code in question. Usually, there is only one round of public consultation on draft Codes.

Communications Alliance has also commissioned or used surveys to inform the development of its rules and three focus groups with consumers (for the development of its Critical Information Summaries when revising the *Telecommunications Consumer Protections Code*, C628:2015, incorporating variation no. 1 2016).<sup>22</sup>

## **2. Interactive Gambling Act and Schedules 5 and 7 of the Broadcasting Services Act Codes**

The *Interactive Gambling Industry Code*, registered under s 38 of the IGA, the *Codes for Industry Co-regulation in Areas of Internet and Mobile Content*, registered under s 62 of Part 5 of Schedule 5 of the BSA, and the *Content Services Code*, registered under s 85 of Part 4 of Schedule 7 of the BSA were developed by the Internet Industry Association.

Communications Alliance assumed responsibility for these Codes in 2014, but it has not subsequently revised those Codes, as it is awaiting a review of the relevant Schedules of the BSA and the conclusion of DOCA's Review into Illegal Offshore Wagering. Processes for consumer and public participation in the development of these Codes will be determined if and when they are revised.

## **3. Standards**

Representatives for consumer organisations are typically not included on Communications Alliance Working Committees that formulate Standards when they have little direct effect on consumers.

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<sup>20</sup> Communications Alliance, 'Drafts for Public Comment' <<https://www.commsalliance.com.au/Documents/public-comment>>.

<sup>21</sup> This change was mandated by the *Telecommunications Legislation Amendment (Consumer Protection) Act 2014* (Cth).

<sup>22</sup> Information provided by Communications Alliance during the Industry Round Table held for this project on 10 May 2019. Critical Information Summaries include essential information for every product and service offered by a telecommunications provider. They are required under the *Telecommunications Consumer Protections Code*.

However, project managers have contacted ACCAN and other relevant bodies, prior to public consultation, when unanticipated matters of consumer and public interest concern have arisen as Standards were drafted. For example, when *AS/CA S042.1: 2018 Requirements for Connection to an Air Interface of a Telecommunications Network – Part 1: General* was drafted, an issue concerning the ability of devices such as mobile and satellite phones and dongles to make calls to emergency services emerged. In this instance, Communications Alliance drew the issue to ACCAN's attention and kept it informed of developments before and after the Working Committee consulted publicly on the Standard. Moreover, the project manager of the Working Committee approached the ACMA and its Emergency Call Service Advisory Committee (ECSAC). ECSAC is comprised of representatives from government, consumer groups, emergency service organisations, carriers, carriage service providers and the emergency call persons.<sup>23</sup> Members of the Working Committee subsequently made a presentation to ECSAC and received oral feedback. They also provided ECSAC members with an opportunity to submit written comments. Similarly, if a building or road authority is affected by a Standard, Communications Alliance's project manager has approached cabling registrars and associations, including relevant international bodies, to inform them of the work of the relevant Committee.

In addition to publishing a written notice inviting members of the public and other interested parties to comment on draft Standards on its website, Communications Alliance will inform ACCAN that draft Standards are available for comment. Communications Alliance will also invite submissions in its newsletter *We Communicate*. The newsletter is circulated to everyone on its mailing list, which includes all Communications Alliance members and anyone who wishes to be added. Anyone who has previously made enquiries about the Standards and individuals who have served on relevant Working Committees is also notified.<sup>24</sup>

On very few occasions, two rounds of public consultation have been held and a Working Committee will sometimes seek further input from a particular submitter. All submitters receive an acknowledgment of their written comments and a brief explanation of whether their comments were accepted or rejected and for what reasons. Few (if any) written comments are received from individual consumers.

#### **4. Guidelines and Specifications**

As stated in section A, formal public consultation is initiated when Guidelines and Specifications are developed (or revised) when a demonstrable need has been identified that broader stakeholder input is required. Consumer and stakeholder engagement may also be undertaken through less formal methods than a 30-day public comment period. For example, the recent development of the *Guideline on Assisting Customers Experiencing Domestic and Family Violence* included extensive consultations and engagement with a range of consumer and advocacy organisations, including a roundtable and multiple reviews of the document.

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<sup>23</sup> See <<https://www.directory.gov.au/portfolios/communications-and-arts/australian-communications-and-media-authority/emergency-call-service-advisory-committee>>.

<sup>24</sup> This is not necessarily the case for Codes due to the much larger number of enquiries.

## **5. Other forms of consumer involvement in Communications Alliance**

ACCAN and Communications Alliance have adopted a Memorandum of Understanding, which stipulates that the CEOs of each organisation meet quarterly. In addition and notwithstanding any interactions between their representatives on Working Committees, the ICAG and ACCAN meet annually. Communications Alliance also participates in the ACMA's CCF.

ACCAN staff are sometimes invited to attend Comms Essentials seminars (ordinarily reserved to Communications Alliance members).

Consumer organisations have not been appointed to Reference Panels or Advisory Groups since 2008 and can no longer be members of Communications Alliance. They have not had representation on the Board of Communications Alliance since 2006.

# Community Broadcasting Association of Australia (CBAA) Codes of Practice

## A. Development of Codes

The *Community Radio Broadcasting Codes of Practice* (the Codes) were developed by the Community Broadcasting Association of Australia (CBAA) and registered with the Australian Communications and Media Authority (ACMA) on 23 October 2008. CBAA stated that they are under review as of October 2018.<sup>1</sup>

Very little information about the way that CBAA develops the Codes for the purposes of Part 9 of the *Broadcasting Services Act 1992* (Cth) could be found in publicly-available documents. Relevant but dated (1995 and 2008) CBAA submissions to Senate Committees<sup>2</sup> indicate that once the CBAA Board approves review and revision of the Codes, the actual work of reviewing and revising them is undertaken by representatives from CBAA members.<sup>3</sup> When CBAA represented community television as well as community radio, a standing committee was used to prepare drafts of new codes by reviewing, among other things, complaints received from listeners and other members of the public; ACMA investigations into complaints (if any) and the codes developed by other sections of the broadcasting industry.<sup>4</sup> CBAA advised that at the time of the review being conducted in 2018, there was no standing committee but there were 'working groups made up of members of the community broadcasting sector and other relevant stakeholders'.<sup>5</sup>

Advice from CBAA on current practice indicates that CBAA, as the sector organisation representing the majority of licensees, takes a coordinator role in relation to the Codes, with substantial input from community radio stations 'and other relevant stakeholders'. Some of these stakeholders have been appointed to CBAA's Codes Advisory Committee.<sup>6</sup> If ACMA raises any concerns or identifies the need to include certain matters in the Codes, these will be considered by CBAA. CBAA will develop a draft and forward to ACMA. Any feedback from ACMA is incorporated into a new draft and provided to members and stakeholders for review.<sup>7</sup> CBAA provides its member radio stations with community service announcements that notify listeners of the draft codes and encourages them to make submissions in writing or by phone.<sup>8</sup> Generally, public consultation occurs after CBAA consults with the community broadcasting sector and then CBAA and ACMA have agreed the contents of draft Codes,<sup>9</sup> but it may also occur before CBAA submits draft Codes to ACMA for review.<sup>10</sup> Finally, the

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<sup>1</sup> Email from CBAA representative to the authors, 26 October 2018.

<sup>2</sup> Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Operation of Codes of Practice in the Television Industry*, Sydney, 18 May 1995, 119-21 (Christina Alvarez, Membership Services Officer and CTV Coordinator, CBAA); Craig Liddell, Acting General Manager, CBAA, Submission to Senate Standing Committee on Environment, Communications and the Arts, *Inquiry into the Effectiveness of the Broadcasting Codes of Practice*, 2 May 2008.

<sup>3</sup> Alvarez, above n 2, 119.

<sup>4</sup> Ibid 120.

<sup>5</sup> Email from CBAA representative, 26 October 2018, above n 1.

<sup>6</sup> Information provided by a CBAA representative as part of the Industry Round Table conducted for this project on 10 May 2019.

<sup>7</sup> Ibid.

<sup>8</sup> Email from CBAA representative to the authors, 30 May 2019.

<sup>9</sup> See, eg, Alvarez, above n 2, 121.

<sup>10</sup> Liddell, above n 2, 7.

CBAA Board must approve any changes made to the Codes before submitting it to ACMA for registration.

## B. Consumer and citizen engagement

Information about the methods used by CBAA to consult with listeners, members of the public and other organisations, along with information about rates of participation and who participates and the rationales for their use, could not be found in the public domain. However, some information was provided by way of correspondence and through CBAA's participation in the Industry Round Table conducted for this project, as indicated below. For example, CBAA provides its radio station members with community service announcements about draft Codes that can be played on air. The announcements encourage listeners to make submissions over the phone. In addition, ACMA's expectations for public consultation undertaken by industry bodies when developing and successfully registering Part 9 codes of practice mean that CBAA must (at a minimum): invite members of the public to submit written comments on draft codes; solicit participation by placing advertisements in major newspapers in all states and territories; issue a media release; provide notices on CBAA's social media channels; and/or add a copy of the draft code to its website. In addition, ACMA will require that public consultation lasts for a minimum number of days and/or stipulate that certain groups, such as remote Indigenous broadcasters,<sup>11</sup> be consulted.

Apart from ACMA's requirements, CBAA has also advised that public engagement mechanisms are determined on a 'case-by-case basis'; for example, if requested, it makes its staff available to speak to consumer and public interest organisations, and it has appointed consumer or public interest organisations to serve on working committees that propose policy recommendations or draft rules.<sup>12</sup> In addition, CBAA has stated that when developing its Codes of Practice, it will take account of relevant research into the experience of listeners and viewers and others carried out by ACMA, the Office of the Australian Privacy Commissioner and the Australian Law Reform Commission. During the Code review in 2018/2019, CBAA appointed third parties to conduct focus groups with community broadcasting 'sector representatives'.<sup>13</sup>

Although there is no public information on whether ACMA would also require CBAA to acknowledge receipt of written comments by submitters, subsequently inform them that their comments were accepted or rejected (in whole or part) and/or provide them with an explanation of its decisions, CBAA has advised that it would do this.<sup>14</sup>

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<sup>11</sup> See, eg, Australian Broadcasting Authority, Submission to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Operations of Codes of Practice in the Television Industry*, 18 May 1995, 5.

<sup>12</sup> Email from CBAA representative, 30 May 2019, above n 8.

<sup>13</sup> Information provided by a CBAA representative during the Industry Round Table held for this project on 10 May 2019.

<sup>14</sup> Email from CBAA representative, 26 October 2018, above n 1.

# Federal Chamber of Automotive Industries (FCAI) Voluntary Code of Practice for Motor Vehicle Advertising

## A. Development of Code

The Federal Chamber of Automotive Industries (FCAI) is the peak industry organisation representing the manufacturers and importers of passenger vehicles, light commercial vehicles, and motorcycles in Australia.<sup>1</sup> Its membership comprises all Australian passenger motor vehicle manufacturers and all of the major international brands which import passenger, light commercial and four-wheel drive vehicles, and motor cycles into Australia.<sup>2</sup>

FCAI's *Voluntary Code of Practice for Motor Vehicle Advertising in Australia* (the Code) was first introduced in August 2002<sup>3</sup> as a means for industry self-regulation of motor vehicle advertising in Australia. The key purpose of the Code is to provide guidance to advertisers in relation to appropriate standards for the portrayal of images, themes and messages relating to road safety.<sup>4</sup>

Prior to the introduction of the Code in 2002, the Australian Association of National Advertisers (AANA)'s *Advertiser Code of Ethics* provided little guidance for vehicle advertising. As a result, the Australian Transport Safety Bureau (ATSB) entered into discussions with AANA, as well as representatives of the advertising and vehicle industries in April 2002.<sup>5</sup> Consequently, the FCAI agreed to introduce a new voluntary industry code for vehicle advertising in August 2002.

Compliance with the code is administered by Ad Standards.<sup>6</sup> Complaints about advertisements for motor vehicles are considered by Ad Standards under both the FCAI Code and AANA's *Code of Ethics*.<sup>7</sup>

The Code has only been revised once since it was introduced in 2002, with the current version of the FCAI Code formally adopted on 1 July 2004.<sup>8</sup> The Explanatory Notes to the 2004 Code indicate that a review was set to be conducted in 2005 and 2006, in consultation with ATSB, AANA and other relevant government stakeholders.<sup>9</sup> An inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) in 2011 stated that this review did occur, and concluded that no changes to the Code were required,<sup>10</sup> although the type of review, results, and date that it occurred have not been made publicly available.

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<sup>1</sup> FCAI, 'About Us' <<https://www.fcai.com.au/about>>.

<sup>2</sup> Tony Weber, Submission to Australian Consumer Law Review, 17 May 2016, 3. A list of FCAI members can be found on the FCAI website: <<https://www.fcai.com.au/about/members>>.

<sup>3</sup> AANA, Submission to Association for Data-driven Marketing and Advertising, *ADMA Discussion Paper*, 13 September 2013, 15.

<sup>4</sup> Ad Standards, 'Motor Vehicle Advertising' <<https://adstandards.com.au/products-issues/car-advertising>>.

<sup>5</sup> Australian Transport Safety Bureau, *Road Safety in Australia: A Publication Commemorating World Health Day 2004* (2004) 229.

<sup>6</sup> See the 'Explanatory Notes' section of the *Voluntary Code of Practice for Motor Vehicle Advertising in Australia* (2004) 3. <<https://www.fcai.com.au/news/codes-of-practice/view/publication/9>>.

<sup>7</sup> Ad Standards, above n 4.

<sup>8</sup> Ibid 3.

<sup>9</sup> Explanatory Notes, above n 6.

<sup>10</sup> House Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, *Inquiry into the Regulation of Billboard and Outdoor Advertising* (2011) 85.

The Committee also recommended that the FCAI conduct transparent reviews of the Code every two years in consultation with road safety authorities and government representatives and publish the findings of the reviews on the FCAI website.<sup>11</sup> Following discussions with the Parliamentary Secretary for Infrastructure and Transport, the FCAI agreed to review the content and operation of the Code.<sup>12</sup>

The review was conducted in 2013.<sup>13</sup> Consultation included: FCAI members; Advertising Standards Board (now Ad Standards); a branch of the federal government's Department of Infrastructure and Transport; state governments 'via the National Road Safety Executive Group'; and the Australian Automobile Association, 'representing consumers'.<sup>14</sup> The review considered a number of complaints received and upheld by Ad Standards between 2009 and 2012 and found 'a high level of compliance' and 'a low level of community concern'.<sup>15</sup> Some changes to the Code were recommended in the report, although these did not appear to be substantial, with a further review recommended 'after a suitable period of time such as 3 to 5 years'.<sup>16</sup>

The Deputy Prime Minister requested FCAI to review the Code in October 2018.<sup>17</sup> At the time of writing, it was believed that review process was ongoing.

## B. Consumer and citizen engagement

The Explanatory Notes to the 2004 Code state, 'In developing the Code, FCAI has undertaken an extensive process of consultation with a wide range of stakeholders'.<sup>18</sup> The stakeholders included representatives from:

- the federal government and its agencies (including the Australian Transport Safety Bureau);
- relevant state and territory government authorities;
- the National Road Safety Strategy Panel (which comprises representatives of police services, road safety authorities, motoring organisations and industry groups);
- the Australian Automobile Association;
- the Australian Association of National Advertisers; and
- the Advertising Standards Bureau Limited [now Ad Standards].

The 2004 Code review was said to be a result of feedback from stakeholders including road safety agencies.<sup>19</sup> The FCAI undertook a review and on this occasion, the Code was updated by AANA in consultation with FCAI and the representatives of the stakeholders listed above. The FCAI website states that, the 'key findings and recommendations stemming from this

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<sup>11</sup> Ibid 89, Recommendation 12.

<sup>12</sup> FCAI, *Federal Chamber of Automotive Industries 2012 Annual Report* (2012) <[http://www.fcai.com.au/library/publication/fcai\\_ar\\_2012\\_web\\_2.pdf](http://www.fcai.com.au/library/publication/fcai_ar_2012_web_2.pdf)>.

<sup>13</sup> FCAI, *Review of the FCAI Voluntary Code of Practice for Motor Vehicle Advertising* (May 2013). The report was not available on FCAI's website but a copy was supplied to the authors on request.

<sup>14</sup> Ibid 6.

<sup>15</sup> Ibid 10.

<sup>16</sup> Ibid 15.

<sup>17</sup> Julie Power, 'Crackdown Coming After Car Ads Show Reckless Driving' *Sydney Morning Herald* (Sydney, 17 October 2018).

<sup>18</sup> Ibid.

<sup>19</sup> Mary Sheehan, Dale Steinhart and Cynthia Schonfeld, *A Content Analysis of Australian Motor Vehicle Advertising* (Research and Analysis Report, Consultation Report CR 288, Centre for Accident Research & Road Safety, June 2006).



review are also available for download from this website<sup>20</sup>; however, they do not appear to still be available online, and there is no further information regarding the consultation process adopted.

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<sup>20</sup> FCAI, 'Voluntary Code of Practice for Motor Vehicle Advertising' <<https://www.fcai.com.au/news/codes-of-practice/view/publication/9>>.

# Free TV Australia

## Commercial Television Industry Code of Practice

### A. Development of Codes

Development and review of the *Commercial Television Industry Code of Practice* (the Code) for the purposes of Part 9 of the *Broadcasting Services Act 1992* (Cth) (BSA) is initiated by the CEO of Free TV Australia (Free TV), formerly known as the Federation of Australian Commercial Television Stations (FACTS). The circumstances in which the Free TV CEO will initiate review and revision of a Code could not be determined from publicly available information. However, when Code review and revision begins, the Free TV CEO meets with the director of Content Safeguards (or equivalent) of the Australian Communications and Media Authority (ACMA) to discuss the issues that should be addressed in the Code and agree the manner in which review and revision will be conducted.<sup>1</sup>

Once the scope and manner of review and revision are determined, a Code Review Group is established.<sup>2</sup> The individuals who serve on the Code Review Group are representatives from members of Free TV (ie, commercial television broadcasters). The Code Review Group prepares a draft code, taking into account programming complaints (if any) made directly to Free TV members by viewers and other members of the public; the findings of any ACMA investigations into complaints made to ACMA; and any discussions concerning Code revision between ACMA and representatives of the commercial broadcasters.<sup>3</sup> The Code Review Group will also take into account matters raised directly with Free TV by the Minister for Communications and any relevant House and Senate committees of Parliament.<sup>4</sup> The draft Code is then presented to ACMA for review. If and when ACMA indicates agreement to proceed, it authorises Free TV to release a copy of it to the public, and public engagement (using the methods described below) begins.<sup>5</sup>

Following public engagement, ACMA, which is provided with copies of all written comments submitted to Free TV during public consultation<sup>6</sup> and a summary of them,<sup>7</sup> meets with the Code Review Group to discuss any issues raised by the public, including consumer and public interest organisations. Codes will be amended when ACMA and the Code Review Group determine that modifications are necessary in light of issues raised during public consultation.<sup>8</sup> If significant changes are made to Codes, Free TV and ACMA may decide that a second round of public consultation is appropriate.<sup>9</sup> Further Code amendments may be needed as a result of any additional feedback obtained. After the text of a Code is agreed, the Code Review Group submits the final version of the Code to the CEO and/or Board of

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<sup>1</sup> Evidence to Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, Canberra, 23 May 2008, ECA 2 (Julie Flynn, CEO, Free TV Australia).

<sup>2</sup> Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media* (April 2000) 73-4.

<sup>3</sup> ACMA, *Annual Report 2008-09* (2009) 94.

<sup>4</sup> *Ibid* 74; Australian Broadcasting Authority, *Annual Report 1997-1998* (1998) 65.

<sup>5</sup> Julie Flynn, above n 1, ECA 2; Free TV Australia, Submission to Senate Standing Committee on Environment, Communications and the Arts, *Inquiry into the Effectiveness of the Broadcasting Codes of Practice*, 2 May 2008, 15.

<sup>6</sup> Julie Flynn, above n 1, ECA 2; Free TV Australia, above n 5, 15.

<sup>7</sup> Julie Flynn, above n 1, ECA 2.

<sup>8</sup> Free TV Australia, above n 5, 15.

<sup>9</sup> Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, Parliament of Australia, Sydney, 18 May 1995, 56 (Anthony Branigan, General Manager, FACTS).

Free TV for their approval. If a Code is approved by the Free TV Board, it is then submitted to ACMA for registration.

Before ACMA can register a Code, it must be satisfied that (i) the Code provides appropriate community safeguards for the matters covered by the Code; (ii) the Code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and (iii) members of the public have been given an adequate opportunity to comment on the Code. If ACMA is satisfied that each of the three requirements is met, it must register the Code.<sup>10</sup>

Free TV has stated that when developing the Code, it will take account of relevant research into the experience of listeners and viewers and others carried out by regulators and agencies such as ACMA, the Office of the Australian Privacy Commissioner and the Australian Law Reform Commission.<sup>11</sup>

## B. Consumer and citizen engagement

Free TV engages with consumer and public interest organisations and members of the public by inviting them to submit written comments on draft codes.

Over the years, Free TV has used a variety of different mechanisms to solicit participation by advertising the opportunity to comment in major newspapers, such as *The Sydney Morning Herald*, *The Australian* and *The Age*, in all states and territories;<sup>12</sup> sending copies of revised drafts to individuals and organisations on its mailing list;<sup>13</sup> and making staff available to speak to interest groups and other government agencies.<sup>14</sup> More recently, Free TV has issued press releases; provided notices via its social media channels; and added copies of draft codes, explanatory guides and/or discussion papers on its website (collectively referred to as 'consultation packages').<sup>15</sup> To support Free TV's advertising efforts, ACMA has also issued statements about Code consultation that are made available on its website and distributed through its social media account.<sup>16</sup>

In addition, members of Free TV have run 'community service announcements' about code consultation on their television channels. For example, when FACTS developed the first *Commercial Television Industry Code of Practice* under Part 9 of the BSA, it commissioned two community service announcements, which were broadcast 44 times in August-September 1992 and 32 times in February-March 1993, respectively. The estimated value of the television advertising was \$1 million.<sup>17</sup> FACTS used television advertising on that occasion in an attempt to encourage participation by individual viewers, as FACTS was 'not

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<sup>10</sup> BSA s 123(4).

<sup>11</sup> Information provided by a Free TV representative during the Industry Round Table held for the project on 10 May 2019.

<sup>12</sup> Free TV last advertised public consultation in major newspapers when it completed a full review of the *Commercial Television Industry Code of Practice* in 2015. It did not advertise in major newspapers when it amended the Code in 2017 to include new rules restricting gambling advertising during live sports coverage, because it had not undertaken a full review of the Code. See ACMA, 'ACMA Registers New Commercial Television Industry Code of Practice' (Media Release 56/2015, 10 November 2015) 4; ACMA, 'New Gambling Advertising Rules During Live Sports' (20 March 2018) <<https://www.acma.gov.au>>; Email from Free TV representative to Karen Lee, 25 July 2018.

<sup>13</sup> When the version of the *Commercial Television Industry Code of Practice*, registered by the ABA in 1999, was drafted, FACTS sent copies of revised drafts to the 228 individuals and organisations on its mailing list. ABA, Submission to Productivity Commission, *Broadcasting Inquiry* (6 December 1999) 32.

<sup>14</sup> FACTS, Submission to Productivity Commission, *Broadcasting Inquiry* (6 December 1999) 13.

<sup>15</sup> ACMA, 'ACMA Registers New Commercial Television Industry Code of Practice', above n 12; ACMA, 'New Gambling Advertising Rules During Live Sports', above n 12.

<sup>16</sup> Ibid.

<sup>17</sup> ABA, Submission to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Operation of Codes of Practice in the Television Industry*, 18 May 1995, 8.

convinced that interest groups necessarily spoke for a great many members of the commercial television viewing audience'.<sup>18</sup> However, members of Free TV have since discontinued this practice.

The amount of time that Free TV gives the public to make written submissions depends on the extent of amendments Free TV proposes to make to a Code. If substantial amendments are made to a Code, Free TV has provided the public a minimum of six weeks in which to make written submissions.<sup>19</sup> For example, when the Codes registered by ACMA on 1 July 2004 and 10 November 2015 were developed, Free TV gave the public six weeks to comment and it accepted late submissions in both instances.<sup>20</sup> However, when Free TV proposes to make a more limited number of changes, it provides the public with less than six weeks to submit comments. For example, consumer and public interest organisations and individuals were given four weeks to make written submissions when the Code was amended to include new gambling advertising rules in 2017.<sup>21</sup> Section 123(4)(b)(iii) of the BSA requires ACMA to be satisfied that members of the public have been given an adequate opportunity to comment on draft codes, and ACMA will provide guidance to Free TV about what it considers to be adequate on a case by case basis.<sup>22</sup>

The number of organisations and individuals submitting comments has varied. When the version of the Code registered by the ABA in 1993 was drafted, FACTS received 532 submissions.<sup>23</sup> When the version of the Code registered by the ABA in 1999 was drafted (over a three year period), FACTS received over 800 submissions during the first two rounds of public consultation<sup>24</sup> and an additional 31 submissions during the third round of public consultation.<sup>25</sup> Over 1,300 responses<sup>26</sup> were made in response to the draft Code registered in 2004. Free TV received 2,874 submissions during public consultation on the draft Code that ACMA registered in November 2015.<sup>27</sup> Most submissions are made by individuals, but community organisations, religious groups and government agencies have submitted comments.<sup>28</sup>

It could not be determined if Free TV acknowledges receipt of written comments by submitters; subsequently informs them that their comments were accepted or rejected (in whole or part) and/or provides them with an explanation of its decision(s). In addition to the consultation package (referred to earlier) for amendments made to the Code in 2017, copies of written submissions were placed on the Free TV website (unless otherwise instructed by submitters).<sup>29</sup>

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<sup>18</sup> Anthony Branigan, above n 9, 53.

<sup>19</sup> Email from Free TV representative, above n 12.

<sup>20</sup> See, eg, ABA, 'ABA Registers Revised Commercial Television Industry Code of Practice', (Media Release 71/2004, 2 July 2004) 1; 'ACMA Registers New Commercial Television Industry Code of Practice', above n 12, 3-4.

<sup>21</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 12.

<sup>22</sup> Email from Free TV representative, above n 12.

<sup>23</sup> ABA, Submission to Senate Select Committee, above n 17, 6.

<sup>24</sup> Anthony Branigan, above n 9, 53.

<sup>25</sup> Letter from Anthony Branigan, General Manager, FACTS to Michael McLean, Secretary, Senate Select Committee on Information Technologies, 5 August 1999, 1.

<sup>26</sup> Julie Flynn, above n 1, ECA 2.

<sup>27</sup> ACMA, 'ACMA Registers New Commercial Television Industry Code of Practice', above n 12, 4.

<sup>28</sup> Anthony Branigan, above n 9, 53; ABA, Submission to Senate Select Committee, above n 17, 6.

<sup>29</sup> ACMA, 'New Gambling Advertising Rules During Live Sports', above n 12.

As a matter of general practice, Free TV also requires its members to make a weekly announcement about the existence of the Code of Practice and the processes viewers and/or listeners must follow to make a complaint.<sup>30</sup>

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<sup>30</sup> Information provided by a Free TV representative during the Industry Round Table held for the project on 10 May 2019.

# Independent Media Council (IMC) Code of Conduct

## A. Development of Code

The Independent Media Council (IMC) is an entity established by Seven West Media (SWM). It was formed in May 2012 after SWM expressed concern about the operations of the Australian Press Council, of which it had been a member.<sup>1</sup> The IMC operates informally and is not an incorporated body.<sup>2</sup>

As at 2018, publications subject to the IMC's jurisdiction include: *The West Australian*; *The Sunday Times*; 20 regional newspapers; 17 community newspapers in Perth (in each of which SWM had a 49.9% interest); the magazines that are part of Pacific Magazines; and the online publications associated with these print titles including *Perth Now*.<sup>3</sup> These publications are referred to as the scheme's 'funding bodies'.<sup>4</sup> (The IMC's guidelines allow publications unrelated to SWM to become 'funding bodies' but to date none has done so).

The IMC consists of three members. All members are independent of SWM, and all have held significant positions in government or the law. General administration of the IMC is handled by an independent assistant employed by the IMC, and the website (at SWM) is managed at the IMC's direction.

Initial attempts at mediation of complaints are handled by Readers' Editors appointed by the various publications subject to IMC's jurisdiction,<sup>5</sup> but at the request of a complainant determinations are sometimes made without this first step. In order to achieve expeditious outcomes most complaints are determined on the papers. In the minority of cases where hearings are held these are conducted informally and in the nature of a round table discussion.

The IMC determines complaints against the *Code of Conduct* (the Code). IMC member, The Hon James McGinty, has explained that the code was developed by negotiation between SWM and the three inaugural members of the IMC.<sup>6</sup> It was adopted when the IMC was formed in May 2012 and requires all publications to be 'honest, accurate, balanced and fair', to disclose all essential facts, and not to give distorting emphasis. It also requires that there be reference to personal characteristics only when relevant; provides protections for children and vulnerable persons; protects privacy; and requires headlines to fairly reflect the contents of articles.

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<sup>1</sup> Kerry Stokes, Evidence to Senate Environment and Communications Legislation Committee in Public Hearings of the Inquiry into the Package of Media Reform Bills, 18 March 2013.

<sup>2</sup> Seven West Media, Submission to Senate Environment And Communications Legislation Committee Inquiry Into the Package of Media Reform Bills (March 2013).

<sup>3</sup> Seven West Media, Submission to Senate Environment and Communications Legislation Committee Inquiry Into Broadcasting Legislation Amendment (Media Reform) Bill 2016 (March 2016), 22.

<sup>4</sup> See clause 4.1 of the *IMC Guidelines*, published on the IMC website, <<http://www.independentmediacouncil.com.au/about.html>>. Clause 4.2 states that the 'inaugural funding body' is SWM. Under clause 4.4, other publishers may join the scheme provided they have the consent of the IMC and the existing funding bodies.

<sup>5</sup> See sections 10.2 to 10.4 of the *IMC Guidelines*. Although information on the Readers' Editors is not provided, these positions, sometimes likened to an internal ombudsman, are usually held by experienced journalists.

<sup>6</sup> Jim McGinty, Evidence to Senate Environment and Communications Legislation Committee in Public hearings of the Inquiry into the Package of Media Reform Bills, 19 March 2013.

## B. Consumer and citizen engagement

Mr McGinty explained the consultation involved in the development of the Code and the IMC operational guidelines in 2012:

In drawing up those particular documents we had input from those people who might be, from time to time, complainants. I refer here to mental health groups, disability groups, Muslim organisations, [and] a range of journalists and media academics.<sup>7</sup>

These groups and individuals were identified by the inaugural IMC members as being likely to be interested in and affected by the Code. All people so identified were invited to meet with the IMC members to discuss the wording of the Code, and (with one exception) all accepted that invitation. Among them were journalists and academics, including Peter Kennedy, Chris Smythe, Bret Christian and Gail Phillips. Aboriginal people were amongst those identified as likely to be interested in and affected, but it was not possible to arrange a meeting with a representative group at the time. IMC members met collectively with participating groups and individuals with each interest group heard separately. A draft Code was provided beforehand to participants who were asked to comment on it at the discussions.

Section 5.1 of the IMC Guidelines states that 'the IMC and the funding bodies will review from time to time the IMC Code of Conduct.' Although the content of the Code is regularly discussed amongst IMC members there have been no proposals for amendment to date.

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<sup>7</sup> Ibid.

## Interactive Advertising Bureau Australia (IAB)/ Australian Digital Advertising Alliance (ADAA) Australian Best Practice Guidelines Internet Based Advertising

The *Australian Best Practice Guidelines Interest Based Advertising*, September 2014 (the Guidelines) govern internet based advertising (IBA), also known as online behavioural advertising. This is explained in the introduction to the Guidelines as follows:

IBA delivers advertisements to the users of an Internet-enabled device based on Web browsing activity or interests demonstrated on that device, or 'behaviour' of that device. An IBA cookie on the device may note the subject matter of searches or visited Web pages and allows the device to be assigned to one or more pre- defined interest categories using a unique number. Relevant advertising is then delivered to that device according to the interest category associated to that device.<sup>1</sup>

The Guidelines only cover 'third party IBA' which is explained in the introduction to the Guidelines as occurring when 'browsing behaviour is used to deliver behavioural or interest based advertisements across unrelated Websites'.<sup>2</sup>

It appears that the Guidelines are developed by the members of the Australian Digital Advertising Alliance (ADAA) which includes the Interactive Advertising Bureau Australia (IAB Australia), Australian Association of National Advertisers (AANA), Australian Data-Driven Marketing Association (ADMA), Australian Interactive Media Industry Association (AIMIA), the Communications Council (TCC), Media Federation of Australia (MFA) and the former Internet Industry Association (among others). However, the guidelines are administered by IAB Australia. There does not appear to be a complaints facility for members of the public.

Information on the IAB website concerning Regulatory Affairs and on Guidelines and Best Practice suggests that the Guidelines are the principal regulatory instrument but other instruments have been developed by a Standards and Guidelines Council.<sup>3</sup> Of these, the *Social Advertising Best Practice Guidelines 2013* (Social Media Guidelines) may also be relevant as they contain rules (among other things) relating to identification of paid content. Unlike other instruments, the general Guidelines and the Social Media Guidelines do have a direct consumer connection. For example the Introduction to the Guidelines states: 'The principles have been developed to better foster transparency, knowledge, and choice for consumers and apply consumer-friendly standards to Third Party IBA.'<sup>4</sup>

Searches of the websites for Your Online Choices and IAB Australia, along with general internet searches and searches of Australian newspaper articles, *adNews* and *Mumbrella* failed to reveal any information about the process used by ADAA to draft the guidelines or its methods of consultation (if any) with consumer and public interest organisations and members of the public. Despite repeated attempts, the responsible organisations did not respond to requests for information.

The IAB Australia website and the Guidelines give some information on the scheme. There does not appear to any dedicated consumer consultation. The Review section of the

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<sup>1</sup> ADAA, *Australian Best Practice Guidelines Interest Based Advertising* (September 2014) 3.

<sup>2</sup> Ibid.

<sup>3</sup> IAB, 'Standards and Guidelines Council' <<https://www.iabaustralia.com.au/members-and-councils/our-councils/item/25-our-councils/1948-standards-and-guidelines-council>>.

<sup>4</sup> *Australian Best Practice Guidelines Interest Based Advertising*, above n 1, 4.



Guidelines states, 'This Guideline may be amended from time to time following consultation with members of the ADAA'.<sup>5</sup> In April 2018, the website listed two instruments as currently open for comment, including the IAB Podcast Measurement Technical Guidelines Version 2.0. However comment appeared to be limited to 'industry input'. For example, the invitation to comment on the podcast guidelines was expressed as follows, 'We invite IAB Australia members and others in the podcasting industry to review the latest US guidelines and provide feedback'. The time period for consultation was three weeks (3 April to 24 April 2018).<sup>6</sup>

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<sup>5</sup> Ibid 14.

<sup>6</sup> It appears the website page inviting comment was later replaced with updated content and a copy of the revised Guidelines. The page ('Podcast Measurement and Technical Guidelines') states: 'IAB Australia members and others in the podcasting industry were invited to review the latest US guidelines and provide feedback to the IAB Audio Council. Upon review, IAB Australia has since released the Podcasting Measurement Guidance and Local Market Update in July 2018.' See <<https://www.iabaustralia.com.au/guidelines-and-best-practice/guidelines-best-practice/item/3-guidelines-and-best-practice/2565-podcasting-measurement-technical-guidelines-open-for-comment>>.

# Media, Entertainment And Arts Alliance (MEAA) Journalists' Code of Ethics

## A. Development of Code

The Media, Entertainment and Arts Alliance (MEAA) is the union representing journalists and other media workers. Until amalgamation with entertainment industry unions in 1993, the media branch of the MEAA was known as the Australian Journalists' Association. It has maintained the *Journalists' Code of Ethics* (the Code) since 1944.

The process for formal enactment of the Code reflects the MEAA's status as a trade union. Section 8 of the *Rules of the Media, Entertainment and Arts Alliance* (the Rules) contains the Code. It also establishes the complaints system. The Rules are registered with the Fair Work Commission under the *Fair Work (Registered Organisations) Act 2009* (Cth) (the Act).

All MEAA members who are journalists are subject to the Code by operation of section 8. Rule 64(b) provides that changes to section 8 – including the Code rules themselves – require the approval of the MEAA Federal Council following approval of the Media section of the union. The changes must then be registered under the Act.

## B. Consumer and citizen engagement

The current version of the Code was adopted in February 1999. It appears that the Code is not formally reviewed or amended on a regular basis. An MEAA fact sheet states that after development in 1944, the Code was reviewed and updated in 1984 and then subject to a 'major review between 1994 and 1999'.<sup>1</sup>

The first version of the Code was drafted by a barrister and later judge of the Victorian Supreme Court.<sup>2</sup> The 1990s review was overseen by an Ethics Review Committee (the Committee) appointed by the MEAA Federal Council. There were four 'non-journalist members' on this committee: Chairman, Fr Frank Brennan; Hon Justice Deirdre O'Connor (President of the Australian Industrial Relations Commission); Professor C A J Coady from the University of Melbourne; and novelist Frank Moorhouse. There were also three journalist members of MEAA. There is no information on the rationale for the appointment of these particular individuals, but it appears they were invited by MEAA to serve on the Committee.<sup>3</sup> The MEAA has said that the Committee met in Sydney and Melbourne, and also conferred by phone, fax and letter.<sup>4</sup>

In December 1993, the Committee released an Issues Paper and MEAA called for submissions, but there were no public hearings. Fifty-seven written submissions were received on the Issues Paper, mostly from journalists and academics, but also from some community organisations (for example, the Country Women's Association of Western Australia). From a list of submitters, it appears there were nine submissions from members of the public. Although the revised Code recommended by the Committee was 'released by

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<sup>1</sup> MEAA, 'Fact Sheet: The MEAA Journalist Code of Ethics', <<https://www.meaa.org/download/faqs-meaa-journalist-code-of-ethics/>>. See also <<https://www.meaa.org/download/how-meaa-journalist-code-of-ethics-complaints-process-works/>>.

<sup>2</sup> Hon Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (DBCDE, February 2012) 192.

<sup>3</sup> MEAA, *Ethics in Journalism: Report of the Ethics Review Committee, Media, Entertainment and Arts Alliance, Australian Journalists' Association Section* (Melbourne University Press, 1997) xv.

<sup>4</sup> Email from MEAA representative to the authors, 27 October 2018.

MEAA for public discussion' in August 1995, there is no further information on this stage of the review, nor on the decision not to hold public hearings.<sup>5</sup>

Separately from the review of this Code, members of the public are involved at the complaints stage: rule 67(a)(ii) of the MEAA Rules requires that the Ethics Panel that oversees complaints under the Code includes four members 'from the general community'.

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<sup>5</sup> Ibid, xv, 166-70. See also Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media* (April 2000) 41.

# Special Broadcasting Service (SBS) Codes of Practice

## A. Development of Codes

The SBS Board has a duty under the *Special Broadcasting Service Act 1991* (Cth) (SBS Act)<sup>1</sup> to develop and notify codes of practice to the Australian Communications and Media Authority (ACMA). The SBS Board initiates the development and review of the SBS *Codes of Practice* (the Codes) to update, improve and maintain the relevance of the Codes, taking into account developments within SBS and changes in the media landscape and industry practice.<sup>2</sup> The development and review of the Codes by the SBS Board reflect the framework set out in the SBS Act and the *Broadcasting Services Act 1992* (Cth) which preserve SBS's independence from government, a key principle of public broadcasting in Australia. The SBS Act provides for the SBS Board to decide the objectives, strategies and policies to be followed by SBS in performing its functions and requires the SBS Board to maintain the independence and integrity of SBS.

Previous Codes reviews have involved a range of processes including:

- The establishment of an internal working group comprised of SBS staff which evaluated the Codes in light of the SBS Charter, industry developments, industry best practice, audience feedback (including complaints made by viewers and other individuals<sup>3</sup> to the SBS Ombudsman and ACMA), and SBS's engagement activities with culturally and linguistically diverse (CALD) communities;<sup>4</sup>
- The conduct of a public consultation at the outset of the relevant review and again once draft amendments had been proposed with feedback collated and evaluated by staff, the SBS Executive Committee and the SBS Board;<sup>5</sup> and
- Engagement with key stakeholders, such as the ABA/ACMA, the SBS Community Advisory Committee (CAC) (which is described further below), whose members in turn consulted with their relevant communities,<sup>6</sup> and SBS staff.<sup>7</sup>

Standards set out in the Codes are proposed and/or modified as appropriate. The SBS Board Codes Review Committee considers proposed amendments and other issues relating to the Codes.<sup>8</sup> The SBS Board must approve all changes made to the Codes before they are notified to the ACMA.

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<sup>1</sup> *Special Broadcasting Service Act 1991* (Cth) (SBS Act) s 10(1)(j).

<sup>2</sup> SBS, *Annual Report 2006-07* (2007) 44; SBS, *Annual Report 2013-14* (2014) 72.

<sup>3</sup> Complaints can be made in languages other than English.

<sup>4</sup> See, eg, Evidence to Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies, *Operations of Codes of Practice in the Television Industry*, Parliament of Australia, Canberra, 18 May 1995, 70-1 (Sawson Madina, Head of Television, SBS); SBS, Submission to ACMA, *Contemporary Community Safeguards Inquiry*, 26 July 2013, 1.

<sup>5</sup> Bruce Meagher, Director, Strategy and Communications, SBS, Submission to Senate Standing Committee on Environment, Communications and the Arts, *Inquiry into the Effectiveness of the Broadcasting Codes of Practice*, 1 May 2008, 1-2.

<sup>6</sup> See, eg, SBS, *Annual Report 2013-14* (2014) 62.

<sup>7</sup> SBS, Submission to the Productivity Commission, *Inquiry into Broadcasting*, May 1999, 3.

<sup>8</sup> SBS, *Annual Report 2016-17* (2017) 73. Note that ss 17(2)(d) and 17(2)(b) respectively of the SBS Act also require at least one SBS Board member to be a person of Aboriginal or Torres Strait Islander background and that the directors must collectively consist of persons with 'a diversity of cultural perspectives'.

## B. Consumer and citizen engagement

The SBS Act does not include a specific requirement for SBS to consult with the community on the development of the Codes. SBS engages with relevant stakeholders in a number of ways.<sup>9</sup>

In 2005-06 SBS consulted with the public at the outset of the review and again after draft amendments to the Codes had been proposed. Comments from the general public were sought by way of advertisements on all SBS media platforms: television, online and radio.<sup>10</sup> Advertisements publicised the proposed Codes, informed the public about where they may obtain a copy of the Codes and invited members of the public to make written submissions if they wished to make comments.

In cases where public consultations have been conducted in the past, the typical duration of any advertising campaign could not be determined, but when SBS first developed its Codes in 1991, it ran advertisements on SBS Television for two weeks and on SBS Radio for one month.<sup>11</sup> Advertisements in multiple languages were played on SBS Radio. When SBS conducted the review that led to the development and notification of new Codes to the ACMA in October 2006, advertisements in 68 languages were played on SBS Radio.<sup>12</sup> Little information about viewer and listener response rates could be found, but 314 submissions were made during public consultation on the draft Codes that were eventually registered by the ACMA in October 2006.<sup>13</sup>

In addition to the public consultations described above, SBS has solicited comments in written form from the Federation of Ethnic Communities Councils of Australia (FECCA), the ethnic communities' council of each state and territory, peak organisations representing Aboriginal and Torres Strait Islander groups, and CAC.<sup>14</sup>

In 2013-14, SBS conducted stakeholder engagement, including with representatives from CAC (see below), key SBS stakeholders (such as FECCA) and industry groups (such as the Screen Producers Association of Australia (SPAA)), to gather feedback on community and industry expectations.<sup>15</sup>

CAC is established under s 50(1) of the SBS Act. Its function is to assist the SBS Board in its duty to 'be aware of, and responsive to, community needs and opinions on matters relevant to the SBS Charter.'<sup>16</sup> To that end, CAC is required to advise the Board on 'community needs and opinions, including the needs and opinions of small or newly arrived ethnic groups, on matters relevant to the SBS Charter.'<sup>17</sup> Individuals may not be appointed to CAC unless the Board is satisfied that they have 'an understanding of Australia's multicultural society; and in particular, ha[ve] interests relevant to, and an understanding of, ethnic, Aboriginal or Torres

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<sup>9</sup> It is also relevant to note that the SBS Codes generally align with industry practice, including direct reference to the *Commercial Television Industry Code of Practice* in relation to advertising restrictions. That Code is subject to public consultation and a finding by the ACMA that it contains appropriate community safeguards.

<sup>10</sup> Meagher, above n 5, 1-2.

<sup>11</sup> Evidence to Senate Select Committee, above n 4, 70-1.

<sup>12</sup> Meagher, above n 5, 2.

<sup>13</sup> Ibid.

<sup>14</sup> Evidence to Senate Select Committee, above n 4, 70.

<sup>15</sup> Email from SBS representative to Karen Lee, 30 October 2018; SBS, *Annual Report 2013-14* (2014) 62.

<sup>16</sup> SBS Act s 10(1)(g).

<sup>17</sup> Ibid s 50(2).

Strait Islander communities.<sup>18</sup> There are currently 10 CAC members. Five members are male; five are female.<sup>19</sup>

The content of the Codes is also informed by audience feedback, which is compiled by SBS staff daily in audience and viewer reports. In addition, SBS has created *The Exchange*, a virtual 'community of audiences'. Members of *The Exchange* are able to provide opinions about, and give ideas for, SBS programs and series (sometimes in response to survey questions posed by SBS). Membership is free, but before joining members must complete a short questionnaire about their backgrounds and viewing habits. New and existing members have the opportunity to win gift cards and other prizes. In addition, SBS regularly runs its own *Meet the Audience* focus group sessions and any relevant information gathered is fed into its code development process.<sup>20</sup>

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<sup>18</sup> Ibid 50(4).

<sup>19</sup> See <<https://www.sbs.com.au/aboutus/community/article/id/160/h/Community-Advisory-Committee>>.

<sup>20</sup> This information on audience feedback was provided in SBS's Comments on *Designing Responsive Regulation: Consumer and Public Engagement Practices in Industry Rule-making – Preliminary Report* (6 June 2019) 2. See also <<https://www.theexchange.sbs.com.au/O.aspx?s=569& m=58509fae-9341-4e44-9735-aa880026893e& psc=8d242204-a339-4845-aa36-a778004d1cea&t=0& a=ca3569f7-d7c7-4df9-b266-a76200e78092& dspvw=d>>.

# Standards Australia

Standards Australia Limited (Standards Australia), a company limited by guarantee, is responsible for the development of Australian standards (ASs), including standards relating to communications, information technology and e-commerce services. Standards Australia also works with Standards New Zealand, a business unit within the New Zealand Ministry of Business, Innovation and Employment, to develop joint Australian and New Zealand standards (AS/NZSs).

All standards adopted by Standards Australia are ‘voluntary’: compliance with them is not mandatory under Australian law. However, compliance with them (in whole or part) may become mandatory when bodies such as the Australian Communications and Media Authority (ACMA) apply, adopt or incorporate them (with or without amendment) into any standards they adopt by way of legislative instrument. For example, ACMA has applied, adopted and/or incorporated ASs and AS/NZSs when adopting radiocommunications standards pursuant to s 162 of the *Radiocommunications Act 1992* (Cth).<sup>1</sup> Similarly, ACMA may apply, adopt and/or incorporate ASs and AS/NZSs into any technical standards it may promulgate under Part 9A of the *Broadcasting Services Act 1992* (Cth), even though it has not yet done so.<sup>2</sup>

Standards Australia is recognised by the Commonwealth government as the ‘peak non-government Standards-writing body’ and as the Australian representative on the International Organisation for Standardization (ISO) and the International Electrotechnical Commission (IEC).<sup>3</sup> It is a policy of Standards Australia to adopt standards developed by the ISO and IEC wherever possible as ASs and AS/NZSs.<sup>4</sup>

## A. Development of Standards

Developing a new or amending an existing AS or AS/NZS requires the approval of the Standards Development and Accreditation Committee (SDAC), a committee of the Standards Australia Board.<sup>5</sup> In order to obtain approval, an interested party must submit a proposal<sup>6</sup> that provides specified information such as the ‘net benefit’ of the proposed standard to the Australian community, the consultation process undertaken with relevant stakeholders and whether they support the proposal. Proposals are subsequently ‘announced’ on the Standards Australia website and comments are requested from interested parties. Proposals are then assessed against a number of criteria, including ‘stakeholder support’, net benefit and ‘strategic alignment to national interest and public policy issues’. The evaluation of proposals is overseen by the Production Management Group (PMG), which consists of the Standards Australia executive – the CEO, Deputy CEO,

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<sup>1</sup> ACMA’s power to apply, adopt or incorporate Standards Australia radiocommunications standards is found in s 314A of the *Radiocommunications Act 1992* (Cth). For examples, see, eg, *Radiocommunications (Paging Service Equipment) Standards 2014* (Cth) and *Radiocommunications (Devices Used in the Inshore Boating Radio Services Band) Standard 2017* (Cth).

<sup>2</sup> See, eg, *Broadcasting Services Act 1992* (Cth) s 130A(6).

<sup>3</sup> Standards Australia, *Standardisation Guide 001: Preparing Standards* (6 October 2016) s 3.1.

<sup>4</sup> *Ibid* s 8.1. See also Standards Australia, *Standardisation Guide 007: Adoption of International Standards* (29 January 2016).

<sup>5</sup> The following information is taken from *Standardisation Guide 001: Preparing Standards*, above n 3, ss 7.1.2-7.1.3.

<sup>6</sup> In response to a recommendation made by cameron.ralph.khoury, a consultancy firm hired to review its technical governance, Standards Australia is considering the different ways it could adopt a more ‘top down’ strategic approach to standards development. See Standards Australia, *Technical Governance Review – Response to Final Report* (April 2018) 5.

General Manager (Operations), and General Manager (Strategy and Public Affairs).<sup>7</sup> The PMG recommends if a proposal should be accepted or rejected by SDAC.<sup>8</sup>

If SDAC approves a proposal to develop an AS, the standard is then developed by a Technical Committee - a standing committee consisting of 'a balanced cross-section of interests that would potentially use, or be influenced by, the standard'.<sup>9</sup> The composition of Technical Committees is determined by the PMG in light of relevant information provided in proposals, its knowledge of the other 'stakeholders' pertinent to the committee, and any feedback received following the announcement of proposals on the Standards Australia website.<sup>10</sup> Organisations appointed by the PMG are responsible for nominating the individuals who serve on the Technical Committees.<sup>11</sup> Standards Australia appoints a Chair for each Technical Committee for a three year term from among the nominated individuals and they usually represents the organisation that nominated them. However, independent chairs may be appointed.<sup>12</sup> Members of Technical Committees are expected to develop or amend standards by way of consensus.<sup>13</sup> Standards Australia also mandates that technical committees must consult publicly on all draft standards.<sup>14</sup> When a draft standard is ready for consultation, it is published by the relevant Technical Committee (along with an announcement inviting written comments) on the Standards Australia website. Following consultation, the Technical Committee is 'obliged to give serious consideration to all comments received and to determine which proposed changes will be incorporated into the Standard'.<sup>15</sup> Once comments are considered and changes (if any) are made, the Technical Committee votes by ballot to determine if the relevant standard should be adopted.<sup>16</sup> Members must vote affirmatively or negatively and any negative votes must be accompanied by 'technical substantiation'. If any negative votes are received, Technical Committee representatives are required to consider the reasons given and attempt to 'find a resolution that is acceptable to the committee as a whole'. Technical committees are expected to attempt to achieve unanimity among all of their members. However, if unanimity cannot be attained, consensus is deemed to be achieved if:

- A minimum of 67% of members eligible to vote have voted affirmatively; and
- A minimum of 80% of votes received are affirmative; and
- No major interest involved with the subject matter of the standard has collectively maintained a negative vote.

The development of an AS/NZS must be supported by Standards Australia and Standards New Zealand, and when the process is undertaken by Standards Australia, an AS/NZS is developed in a similar way.<sup>17</sup> However, a joint Technical Committee, consisting of a 'balanced range of representatives' from Australia and New Zealand 'with a minimum of two

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<sup>7</sup> Standards Australia, 'Board & Executive' <<https://www.standards.org.au/board-executive>>.

<sup>8</sup> *Standardisation Guide 001: Preparing Standards*, above n 3, s 7.1.3.

<sup>9</sup> *Standards Australia, Standardisation Guide 002: Structure and Operation of Standardisation Committees* (12 July 2018) s 6.3.

<sup>10</sup> *Ibid* s 7.1.

<sup>11</sup> *Ibid* s 6.2.

<sup>12</sup> *Ibid* s 11.

<sup>13</sup> *Ibid* 12.5.5.

<sup>14</sup> *Standardisation Guide 001: Preparing Standards*, above n 3, s 7.4.

<sup>15</sup> *Ibid*.

<sup>16</sup> The following information is taken from *ibid* s 7.5.

<sup>17</sup> There were no details of the process used when Standards New Zealand undertakes the development of an AS/NZS on the Standards New Zealand website (<[www.standards.govt.nz](http://www.standards.govt.nz)>).



interests per country represented',<sup>18</sup> is established. The same voting procedures are applied to Australian representatives on an AS/NZS Technical Committee, but the Australian representatives may consider adopting an AS if they and the New Zealand representatives cannot reach consensus.<sup>19</sup>

## B. Consumer and citizen engagement

Consumer organisations may ask Standards Australia to develop a new or amend an existing AS or AS/NZS. They may also be appointed to Technical Committees. CHOICE, for example, is a member of the CT-002 Broadcasting and Related Services committee, which is responsible for 'standardization in the field of broadcasting irrespective of the means of delivery'.<sup>20</sup> The Australian Communications Consumer Action Network (ACCAN) is a member of the IT-042 Internet of Things and Related Technologies committee.<sup>21</sup> However, consumer representatives are not appointed to all Technical Committees. There are, for example, no consumer organisations who are members of the RC-004 Radiocommunications Equipment – Maritime and Safety of Life and RC-006 Radiocommunications Equipment – General committees as of 30 August 2018.

According to its *Standardisation Guide 020: Participation by Consumers in Standardisation*,<sup>22</sup> where consumer organisations are needed to ensure 'a balanced cross-section of interests' on its Technical Committees, Standards Australia will seek suitable representatives by contacting Consumers Federation of Australia (CFA) and its affiliated consumer organisations, such as CHOICE and ACCAN.<sup>23</sup> However, in some instances, consumer representatives who have no affiliation with CFA are appointed to Standards Australia Technical Committees. They include 'specialist groups, such as sporting organisations, consumers with disabilities or other user groups'.<sup>24</sup> Standards Australia provides an annual grant, administered by the Consumer Action Law Centre, to defray the costs of participation by representatives of CFA and its affiliates in Technical Committees. Funding for travel and accommodation expenses incurred by organisations not affiliated with CFA as a result of participation in Standards Australia Technical Committees is also provided.

As mentioned earlier, when a draft of a new standard is ready for consultation, it (along with an announcement inviting written comments) is published by the relevant Technical Committee on the Standards Australia website. Standards Australia will provide hard copies of draft standards for a fee. However, if a draft standard amends an existing standard, only the proposed amendments are published on the Standards Australia website. In order to see the existing standard, a person must purchase a copy from Standards Australia.<sup>25</sup> The period during which interested parties may submit comments varies depending on the draft standard at issue. However, interested parties usually have no less than 9 weeks to submit

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<sup>18</sup> *Standardisation Guide 002: Structure and Operation of Standardisation Committees*, above n 9, s 5.1.

<sup>19</sup> *Standardisation Guide 001: Preparing Standards*, above n 3, s 7.5.

<sup>20</sup> Standards Australia, *CT-002 Broadcasting and Related Services Committee Terms of Reference* (2011).

<sup>21</sup> Standards Australia Public Portal

<http://www.sdpp.standards.org.au/ActiveProjects.aspx?SectorName=Communications,%20Information%20Technology%20and%20e-Commerce%20Services&CommitteeNumber=IT-042&CommitteeName=Internet%20of%20Things%20and%20Related%20Technologies#simple2>.

<sup>22</sup> Standards Australia, *Standardisation Guide 020: Participation by Consumers in Standardisation* (25 January 2016).

<sup>23</sup> The guide actually refers to Consumers Telecommunications Network, but this presumably is an error.

<sup>24</sup> *Standardisation Guide 020: Participation by Consumers in Standardisation*, above n 22, 3.

<sup>25</sup> cameron.ralph.khoury, *Technical Governance Review Report: Standards Australia* (April 2018) 16.

comments.<sup>26</sup> Interested parties must submit comments electronically and must register for a 'Standards Hub public account'. Standards Australia states that registration is needed so submitters may 'return at a later stage to submit more comments or review [their] original entries before officially submitting them' and Standards Australia may contact them if it needs to clarify any comments.<sup>27</sup> Comments (if any) received by Standards Australia are not placed on its website and cannot be viewed by the public. It also appears that Standards Australia and/or Technical Committees do not acknowledge or provide comments in response to submissions made by individuals and other organisations during public consultation.<sup>28</sup> As submissions are not publicly available, the rates of participation by individual members of the public could not be determined or assessed.

In April 2018, cameron.ralph.khoury, a consultancy firm appointed by Standards Australia to review its technical governance, observed in its final report that there was 'strong criticism' of 'inconsistent inclusion, expertise and balance on [technical] committees' and 'low accessibility and transparency [of Standards Australia processes] to those outside a perceived 'inner circle'.<sup>29</sup> To that end, it recommended that Standards Australia adopt processes that are more 'open'.<sup>30</sup>

In its response to the report, Standards Australia stated it was considering the following measures to address the issues raised by cameron.ralph.khoury:

- Developing a publicly available bulletin board with information on standards, proposals for standards and other projects and a mechanism to allow stakeholders to 'follow' a standard and receive notification of progress on it.
- Developing a new online proposal system that would allow all interested parties a better way to provide feedback on existing standards, any proposed changes to them or new areas of activity.
- Requiring Standards Australia to assume responsibility for conducting stakeholder and community consultation on all standard proposals. Currently, interested parties who submit proposals are responsible for consultation with relevant groups.<sup>31</sup>
- Providing more information that is publicly available about the composition of Technical Committees, including the names of all representatives, their CVs and any interests they have declared.
- Permitting Standards Australia (in addition to nominating organisations) to appoint representatives to Technical Committees<sup>32</sup> where needed for 'expertise, perspective and balance'<sup>33</sup> and on the basis of 'technical, regulatory and public policy merit' and 'community impact'.<sup>34</sup>

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<sup>26</sup> *Standardisation Guide 001: Preparing Standards*, above n 3, s 7.4.

<sup>27</sup> Standards Australia, *Register for a Standards Hub Public Account* <<https://hub.standards.org.au/hub/public/registration.jsp>>.

<sup>28</sup> cameron.ralph.khoury, above n 25, 16.

<sup>29</sup> *Ibid* 8.

<sup>30</sup> *Ibid* 8, 11.

<sup>31</sup> *Technical Governance Review – Response to Final Report*, above n 6, 5.

<sup>32</sup> *Ibid* 6.

<sup>33</sup> cameron.ralph.khoury, above n 25, 14.

<sup>34</sup> *Technical Governance Review – Response to Final Report*, above n 6, 6.

- Making records of meetings and decisions made concerning the composition of Technical Committees publicly available.
- Publishing all standard-related documentation, including minutes, drafts, committee information, and allowing interested parties to provide their comments on an on-going basis.<sup>35</sup>
- Publishing drafts of revised standards, for public comment, that highlight where changes have been made to the previous versions of them; providing plain English commentary on the standard at the time of public comment in order to ‘engage a broader community base to development work’; and making the Standards Australia public comment portal more ‘user friendly’.<sup>36</sup>

Publishing decisions of Technical Committees on comments submitted during public consultation and information about how Technical Committee representatives have voted.<sup>37</sup>

Standards Australia subsequently consulted with its stakeholders about its response and in July 2018 published a Technical Governance Review Implementation Plan for the 2019 financial year (the Plan).<sup>38</sup> The Plan refers to a number of initiatives to develop more open processes and ensure more proactive quality assurance, including developing a ‘Contributor Portal’, improving the public comment process, deploying independent facilitators and technical writers in Technical Committees and reviewing the policies concerning the appointment, tenure and performance of Technical Committee chairs. However, little detail is provided, so it is difficult to determine the exact nature of each initiative and the effect they will have on the Standards Australia standards development framework or consumer and public participation in standards development. Standards Australia has said that a Technical Governance Review Implementation Plan for the 2020 financial year will be published in July 2019.

## C. Other

Standards Australia permits up to five bodies representing consumers to be members of its organisation.<sup>39</sup> Currently, ACCAN and CHOICE are members. They are permitted to vote at ordinary and annual general meetings of the members and appoint a councillor to the Standards Australia Council,<sup>40</sup> the function of which is to advise and make recommendations to the Board of Directors.<sup>41</sup>

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<sup>35</sup> Ibid 7.

<sup>36</sup> Ibid 8.

<sup>37</sup> Ibid 9.

<sup>38</sup> See <<https://www.standards.org.au/getmedia/948baf96-0cd8-4ffc-be10-e26eb46258a8/Technical-Governance-Review-Implementation-Plan.pdf.aspx>>.

<sup>39</sup> *Constitution of Standards Australia Limited ABN 85 087 326 690* (13 November 2015) cl 11(e).

<sup>40</sup> Ibid cls 30, 51.

<sup>41</sup> Ibid 67(d).