

Reimbursing costs of developing or varying consumer-related telecommunications industry codes

A guide for industry bodies

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Introduction

This guide explains the processes the Australian Communications and Media Authority (the ACMA) uses to administer the scheme for reimbursing industry bodies and associations for the costs of developing and varying consumer-related telecommunications industry codes.

The reimbursement scheme is set out in Division 6A of Part 6 of the *Telecommunications Act 1997*.

The reimbursement scheme complements the procedures and provisions relating to the development, variation and registration of codes set out in Part 6 of the Telecommunications Act.

This document is intended as a guide only and should not be used as a substitute for legal advice.

The scheme is a multi-stage process that involves:

- > an industry body making an estimate of costs
- > the ACMA considering that estimate and deciding whether to make a declaration of eligibility
- > the industry body claiming costs
- > the ACMA considering that claim and deciding whether to make a determination of entitlement for reimbursement.

The reimbursed costs are then recovered by the ACMA from carrier licence fees. This process is outlined in diagrammatic form in the next section.

Administering the scheme

Table 1: Process

1. Application for declaration of eligibility	<ul style="list-style-type: none"> > Industry body applies to the ACMA for a declaration of eligibility for reimbursement
2. Declaration of eligibility	<ul style="list-style-type: none"> > The ACMA analyses the claim against requirements of the <i>Telecommunications Act 1997</i> (20 days to ask for further information) > The ACMA makes declaration of eligibility or refuses to make the declaration by written notice to the applicant > The ACMA advises industry body of the outcome of its claim
3. Claim for reimbursement	<ul style="list-style-type: none"> > Industry body gives the ACMA a copy of the consumer code for consideration for registration > Industry body makes claim for reimbursement (must be within two years of declaration of eligibility) > The ACMA analyses the claim (claim cannot include cost items that are not refundable costs)
4. Determination of entitlement for reimbursement	<ul style="list-style-type: none"> > The ACMA determines amount of the entitlement for reimbursement > The ACMA makes payment to industry body out of consolidated revenue
5. Reimbursement is recovered	<ul style="list-style-type: none"> > Reimbursement amount recovered from carrier licence fees in the following financial year

Who can apply for reimbursement?

Telecommunications industry bodies and associations that propose to develop or vary an industry code covered by the scheme are eligible to apply for reimbursement under the scheme. This includes those bodies and associations established to facilitate communications self-regulation and to represent the interests of participants in a particular section of the telecommunications industry.

Codes covered by the scheme

The reimbursement scheme applies to the development or variation of telecommunications industry codes that:

- > apply to participants in a particular section of the telecommunications industry
- > deal with one or matters relating to the telecommunications activities of those participants
- > deal wholly or mainly with one or more matters relating to the relationship between carriage service providers (CSPs) and their retail customers.

Section 107 of the Telecommunications Act provides that an 'industry code' is a code developed under Part 6, which includes those codes made in response to a request by the ACMA under section 118.

The scheme does not provide for reimbursement of the costs of developing standards, specifications, guidelines or other supporting documents developed by industry bodies and associations. Nor does the scheme apply to codes developed under other legislation administered by the ACMA, such as the *Broadcasting Services Act 1992*.

Applying for a declaration of eligibility for reimbursement

The applicant should complete the online application form at <http://acma.gov.au/theACMA/industry-reimbursement-claim>, attaching:

- > the terms of reference, activity plan or project plan for the intended code development or variation activity
- > a spreadsheet breaking down the estimated total of refundable costs likely to be incurred into categories of refundable costs (GST-exclusive).

The ACMA may request further information about the application within 20 business days after the application is made, and may refuse to consider the application until the further information is provided.

Declaring eligibility for reimbursement

The ACMA will assess the application for a declaration of eligibility and, if the eligibility criteria (specified in subsection 136B(1) or 136B(2A)) are satisfied, it must make a declaration of eligibility for reimbursement. The declaration is irrevocable and remains in force for two years. If the eligibility criteria are not satisfied, the ACMA must refuse, by written notice, to make a declaration.

The ACMA will generally notify the applicant of its decision about eligibility within 60 days of receiving a complete application. If a request for further information is made, the ACMA will generally notify the applicant of its decision within 60 days of receipt of the requested information.

The ACMA will provide the applicant with a copy of the declaration of eligibility and a purchase order number (for the applicant's reimbursement invoice).

The criteria for determining eligibility

The ACMA must make a declaration of eligibility for reimbursement if it is satisfied of all of the following:

- > the body or association applying for a declaration represents the section of the telecommunications industry to which the code proposed to be developed or varied will apply (as stated in the application form)
- > the code will deal wholly or mainly with one or more matters relating to the relationship between CSPs and their retail customers
- > the process for developing or varying the code, as outlined in the application, is likely to ensure that the interests of retail customers are adequately represented in relation to the development or variation of the code
- > the total of the refundable costs likely to be incurred by the body or association in developing or varying a code, as set out in the estimate that accompanied the application, is reasonable.

Claiming for reimbursement of costs

Once the ACMA declares an industry body or association is eligible for reimbursement, it has two years within which it must submit the code to the ACMA for registration, or approval of variation, accompanied by a claim for reimbursement of costs.

The applicant submits an application form online at <http://www.acma.gov.au/theACMA/claim-for-reimbursement> attaching:

- > a copy of the code submitted to the ACMA for registration or approval of variation
- > a spreadsheet itemising the costs incurred by the body or association in developing or varying the code (GST-exclusive)
- > a written declaration by an approved auditor that he or she is of the opinion the written statement itemising refundable costs complies with approved auditing requirements
- > a tax invoice for the total amount of costs, which includes the purchase order number provided by the ACMA.

Determining eligibility for reimbursement

The ACMA will assess the claim and determine eligibility for reimbursement.

The ACMA cannot, under subsection 136C(1) or subsection 136C(3A) (whichever applies), determine that the body or association is entitled to be paid a specified amount, if the written statement itemising costs incurred in developing or varying the code includes one or more costs that are non-refundable costs. In the [Telecommunications \(Non-refundable Code Development Costs and Auditing Requirements\) Determination 2016](#), the ACMA has declared the following costs to be non-refundable:

- > costs that are not directly attributable to the development or variation of a consumer-related industry code
- > costs incurred by an industry participant during the development or variation of a consumer-related industry code that would have been incurred had the participant not participated in the code development or variation process
- > costs incurred by a consumer body that are the subject of:
 - > a grant of financial assistance under subsection 593(1) of the Act by the Minister
 - > another program funded by the Commonwealth
- > any cost to the extent to which it was not reasonably incurred as part of the code development or variation process.

In assessing the claim, the ACMA must ensure that:

- > a declaration of eligibility for the code development or variation has been made
- > the code or variation was given to the ACMA under section 117 or section 119A of the Telecommunications Act at a time when the declaration of eligibility was in force
- > the code deals wholly or mainly with one or more matters relating to the relationship between CSPs and their retail customers

- > the process for the development or variation of the code ensured that the interests of those retail customers were adequately represented.

If these criteria, together with the criteria specified in paragraphs 136C(1)(e) and (f) or 136C(3A)(e) and (f) of the Telecommunications Act, are satisfied, the ACMA must determine that the body or association is entitled to be paid a specified amount, which will be the lesser of:

- > the cost estimate submitted with the application for declaration of eligibility
- > the total of the written statement of itemised costs submitted under sub-paragraph 136C(1)(e)(i) or 136C(3A)(e)(i).

The ACMA will endeavour to notify the applicant in writing of its decision about reimbursement within 60 days of receiving a complete application for a claim for reimbursement.

The ACMA will pay the specified amount to the body or association within 30 days of the date it notifies the body or association of its entitlement to be paid.

Categories of refundable costs

Industry bodies may claim for reimbursement of refundable costs. 'Refundable costs' is defined in section 136E of the Telecommunications Act to be a cost incurred by the body or association in developing the code or varying the code, as the case may be, other than a cost specified in the Telecommunications (Non-refundable Code Development Costs and Auditing Requirements) Determination 2016.

Examples of costs that the ACMA considers to be refundable costs include:

- > research costs associated with code development or variation
- > code development or variation costs, including:
 - > payment for a code development committee chairperson
 - > payment for independent expertise for drafting, legal advice, consumer advice and other relevant specialist expertise or advice (the ACMA expects that the reasonableness of some costs will need to be demonstrated with multiple quotes)
 - > travel costs of consumer representatives, external chairs, drafters and lawyers
 - > costs of hosting meetings
 - > communication infrastructure costs—such as video and teleconference
- > consultation costs, including:
 - > costs of running public forums
 - > advertising to advise of public forums and public consultation
- > other costs incurred prior to the registration or approval of variation of the code, including:
 - > costs of mediation with consumer representatives on the content of codes
 - > printing, publishing and web authoring
 - > audit costs.

What are retail customers?

The ACMA considers that retail customers are those customers to whom a service provider sells goods and services directly. Codes that deal with the relationship between CSPs and wholesale customers are excluded from the scheme.

The ACMA cannot make a declaration of eligibility if a code only incidentally deals with matters relating to the relationship between CSPs and their retail customers. It also cannot provide pro-rata reimbursement for the number of provisions in such codes that are related to the relationship between CSPs and their retail customers.

Codes not covered by the reimbursement scheme

Codes that deal wholly or mainly with 'community safeguard' or 'operational' matters are not covered by the reimbursement scheme.

Auditing declaration

The claimant must provide the ACMA with a written declaration by an approved auditor that he or she is of the opinion that the written statement itemising one or more costs incurred by the body or association in developing the code complies with the approved auditing requirements as specified in the [Telecommunications \(Non-refundable Code Development Costs and Auditing Requirements\) Determination 2016](#).

Contact us

For more information about the reimbursement scheme, including advice on how to complete an application for a declaration of eligibility or a claim for reimbursement, contact us by:

Mail: Manager, Communications Futures
Communications Safeguards and Networks Branch
Australian Communications and Media Authority
PO Box 13112 Law Courts
Melbourne VIC 8010

Email: CommunicationsFutures@acma.gov.au

Electronic submissions in Microsoft Word or Rich Text Format are preferred.

Appendix A— Reimbursement scheme provisions in the Telecommunications Act

Division 6A—Reimbursement of costs of development or variation of consumer-related industry codes

136A Application for eligibility for reimbursement of costs of development or variation of consumer-related industry code

- (1) If a body or association proposes to develop or vary an industry code that:
 - (a) applies to participants in a particular section of the telecommunications industry; and
 - (b) deals with one or more matters relating to the telecommunications activities of those participants; and
 - (c) deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers;

the body or association may apply to the ACMA for a declaration that the body or association is eligible for reimbursement of refundable costs incurred by it in developing the code or varying the code, as the case may be.

Note: For **refundable cost**, see section 136E.

Form of application etc.

- (2) An application must be:
 - (a) in writing; and
 - (b) in accordance with the form approved in writing by the ACMA; and
 - (c) accompanied by:
 - (i) an estimate of the total of the refundable costs likely to be incurred by the body or association in developing the code or varying the code, as the case may be; and
 - (ii) a statement breaking down that estimate into categories of refundable costs.

Further information

- (3) The ACMA may, within 20 business days after an application is made, request the applicant to give the ACMA, within the period specified in the request, further information about the application.
- (4) The ACMA may refuse to consider the application until the applicant gives the ACMA the information.

Definition

(5) In this section:

business day means a day on which the ACMA is open for business in the Australian Capital Territory and in Victoria.

136B Declaration of eligibility for reimbursement of costs of development or variation of consumer-related industry code

Development of code

- (1) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the development of a code, the ACMA must make the declaration if it is satisfied that:
- (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code will deal wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (c) the process for developing the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the development of the code; and
 - (d) the total of the refundable costs likely to be incurred by the body or association in developing the code, as set out in the estimate that accompanied the application, is reasonable.
- (2) If the ACMA is not satisfied as to the matters set out in subsection (1), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

Variation of code

- (2A) If a body or association makes an application under subsection 136A(1) for a declaration in relation to the variation of a code, the ACMA must make the declaration if it is satisfied that:
- (a) the body or association represents the section of the telecommunications industry referred to in paragraph 136A(1)(a); and
 - (b) the code is registered under this Part; and
 - (c) the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the process for varying the code, as outlined in the application, is likely to ensure that the interests of those retail customers are adequately represented in relation to the variation of the code; and
 - (e) the total of the refundable costs likely to be incurred by the body or association in varying the code, as set out in the estimate that accompanied the application, is reasonable.
- (2B) If the ACMA is not satisfied as to the matters set out in subsection (2A), the ACMA must, by written notice given to the applicant, refuse to make the declaration.

General provisions

- (3) A declaration under this section is irrevocable, and remains in force for two years.

- (4) A declaration under this section is not a legislative instrument for the purposes of the Legislative Instruments Act 2003.

136C Reimbursement of costs of developing or varying consumer-related industry code

Reimbursement of costs—development of code

- (1) If:
- (a) a section 136B declaration was made in relation to the development of an industry code by a body or association; and
 - (b) when the section 136B declaration was in force, the body or association gave a copy of the code to the ACMA under section 117; and
 - (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
 - (d) the ACMA is satisfied that the process for the development of the code ensured that the interests of those retail customers were adequately represented in relation to the development of the code; and
 - (e) the copy of the code was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in developing the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the development of the code; and
 - (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in developing the code; and
 - (ii) was incurred when the section 136B declaration was in force;

the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.

Note: For **refundable cost**, see section 136E.

- (2) The specified amount must be equal to whichever is the lesser of the following:
- (a) the total of the costs itemised in the subparagraph (1)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (1) of its entitlement to be paid that amount.

Reimbursement of costs—variation of code

(3A) If:

- (a) a section 136B declaration was made in relation to the variation of an industry code by a body or association; and
- (b) when the section 136B declaration was in force, the body or association gave a copy of the variation to the ACMA under section 119A; and
- (c) the ACMA is satisfied that the code deals wholly or mainly with one or more matters relating to the relationship between carriage service providers and their retail customers; and
- (d) the ACMA is satisfied that the process for the variation of the code ensured that the interests of those retail customers were adequately represented in relation to the variation of the code; and
- (e) the copy of the variation was accompanied by:
 - (i) a written statement itemising one or more costs incurred by the body or association in varying the code; and
 - (ii) a written claim for reimbursement of those costs; and
 - (iii) a written declaration by an approved auditor that he or she is of the opinion that the subparagraph (i) statement complies with the approved auditing requirements; and
 - (iv) a written statement describing the process for the variation of the code; and
- (f) the ACMA is satisfied that each of the costs itemised in the subparagraph (e)(i) statement:
 - (i) is a refundable cost incurred by the body or association in varying the code; and
 - (ii) was incurred when the section 136B declaration was in force;

the ACMA must, by written notice given to the body or association, determine that the body or association is entitled to be paid a specified amount.

Note: For **refundable cost**, see section 136E.

- (3B) The specified amount must be equal to whichever is the lesser of the following:
 - (a) the total of the costs itemised in the subparagraph (3A)(e)(i) statement;
 - (b) the estimate that accompanied the application for the section 136B declaration.
- (3C) The ACMA, on behalf of the Commonwealth, must pay the specified amount to the body or association within 30 days after the day on which the body or association was notified under subsection (3A) of its entitlement to be paid that amount.

Appropriation

- (4) The Consolidated Revenue Fund is appropriated for payments under this section.

Approved auditors and approved auditing requirements

- (5) The ACMA may make a written determination specifying:
- (a) the persons who are to be **approved auditors** for the purposes of this section; and
 - (b) the requirements that are to be **approved auditing requirements** for the purposes of this section.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (6) A determination under subsection (5) has effect accordingly.
- (7) A determination under subsection (5) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

136D Costs—transactions between persons not at arm’s length

If:

- (a) a body or association has incurred a cost in connection with a transaction where the parties to the transaction are not dealing with each other at arm’s length in relation to the transaction; and
- (b) apart from this section, the cost is counted for the purposes of the application of this Division to the body or association; and
- (c) the amount of the cost is greater than is reasonable;

the amount of the cost is taken, for the purposes of the application of this Division in relation to the body or association, to be the amount that would have been reasonable if the parties were dealing with each other at arm’s length.

136E Refundable cost

- (1) For the purposes of this Division, a *refundable cost* incurred by a body or association in developing or varying a code is a cost incurred by the body or association in developing the code or varying the code, as the case may be, other than a cost specified in a written determination made by the ACMA under this subsection.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- (2) A determination under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Appendix B— Explanation of terms used in the scheme

Sections of the telecommunications industry

The applicant must represent a section of the telecommunications industry. Some of these sections are set out in subsection 110(2) of the Telecommunications Act. The ACMA has also determined additional sections of the telecommunications industry under subsection 110(3).

These sections are:

- > carriers
- > service providers
- > carriage service providers
- > carriage service providers who supply standard telephone services
- > carriage service providers who supply public mobile telecommunications services
- > content service providers
- > persons who perform cabling work (within the meaning of Division 9 of Part 21)
- > persons who manufacture or import customer equipment or customer cabling
- > electronic messaging service providers
- > persons who install optical fibre lines or facilities used, or for use, in or in connection with optical fibre lines
- > public number directory producers
- > portability service suppliers
- > the National Relay Service provider
- > cabling service operators.

Telecommunications activities

The code must deal with one or more matters relating to the following ‘telecommunications activities’ (which are defined by section 109 of the Telecommunications Act):

- > carrying on business as a carrier
- > carrying on business as a carriage service provider
- > supplying goods or services for use in connection with the supply of a listed carriage service
- > supplying a content service using a listed carriage service
- > manufacturing or importing customer equipment or customer cabling
- > installing, maintaining, operating or providing access to:

- > a telecommunications network or a facility used to supply a listed carriage service
- > carrying on business as an electronic messaging service provider.

Codes that deal wholly or mainly with the relationship between CSPs and their retail customers

Retail customers

The ACMA considers that retail customers are those customers to whom a CSP sells goods and services directly. The ACMA considers that this common meaning applies to residential customers, small businesses and corporate customers with a retail relationship with a CSP. Codes that deal with the relationship between CSPs and wholesale customers are excluded from the scheme.

Wholly or mainly related to the retail relationship

The ACMA will assess whether a proposed code or the code proposed to be varied deals 'wholly or mainly with the relationship between the carriage service providers and their retail customers' (the 'retail relationship') by examining the key purpose of the code. The ACMA considers that a proposed code or the code proposed to be varied may deal incidentally with some matters that do not relate to the retail relationship and still be considered to deal mainly with the retail relationship.

Codes not covered by the reimbursement scheme

Codes that deal wholly or mainly with 'community safeguard' matters are not covered by the reimbursement scheme. Characteristics of these codes include:

- > the code is based on a one-to-many relationship between the CSP and the community
- > the code is not dependent on a contractual relationship existing between a customer and the CSP
- > the community as a whole benefits from the actions of the CSP under the code.

Similarly, codes that deal wholly or mainly with 'operational' matters are not covered by the reimbursement scheme. Characteristics of these codes include:

- > the code focuses on the transactional relationship between CSPs
- > the code sets minimum performance benchmarks for CSPs
- > the code balances service performance with commercial imperatives
- > the code establishes inter-operator arrangements giving effect to customer choice.

Appendix C— Link to Determination

Note: Links only are provided to the Determination on the Comlaw website to ensure any updates are captured by this guide.

- > Telecommunications (Non-refundable Code Development Costs and Auditing Requirements) Determination 2016: legislation.gov.au/Details/F2016L00365