

18 July 2011

By email: reconnectingthecustomer@acma.gov.au

Manager, Public Inquiry Section
Australian Communications and Media Authority
PO Box 13112, Law Courts
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Dear Authority Members

ACMA Public Inquiry—*Reconnecting the Customer, Draft Inquiry Report*

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a submission to Australian Communications and Media Authority (the **Authority**) on its Draft Inquiry Report, *Reconnecting the Customer*, released on 1 June 2011.

As with our initial submission to the inquiry, we have limited our substantive comments to two issues being:

- the regulatory model for telecommunications generally; and
- the governance structure of the Telecommunications Industry Ombudsman (**TIO**).

We also endorse the submission from the Australian Communications Consumer Action Network.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss

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or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Regulatory model for telecommunications

We are pleased that the Authority recognises the need for a drastic improvement in the customer service practices of the telecommunications industry and are broadly supportive of the six proposals identified in the Draft Report. However, we are disappointed that the Draft Report has not made stronger recommendations in relation to the regulatory model for telecommunications generally.

The Draft Report correctly identifies significant weaknesses with the regulatory policy underpinning the *Telecommunications Act 1997* (Cth), being one that promotes the use of self-regulation. The Draft Report identifies a number of "preferred mechanisms" for achieving the six proposals in addition to "regulatory mechanisms". "Regulatory mechanisms" rely on the use of powers conferred to the Authority under the current law, while "preferred mechanisms" promote the use of industry standards and service provider determinations and would require legislative change for the mechanism to be adopted. This is because industry standards can currently only be developed by the Authority in relation to issues that are not dealt with, or not dealt with adequately, by an industry-developed code, while service provider determinations can only be developed by the Authority in relation to specified matters.

We support an approach that relies on the "preferred mechanisms" over "regulatory mechanisms" (which generally relies upon new or amended codes) for a number of reasons. These include:

- the notoriously low levels of industry signatories to industry-based codes, particularly the Telecommunications Consumer Protection (TCP) Code;
- seeking industry agreement to new codes or code amendments is time intensive and is unlikely to result in swift improvement to customer service in the industry; and
- compliance monitoring and enforcement of industry-based codes has been ineffective, and the Authority's ability to deal with breaches of the code is limited.

We are also concerned that, due in part to the limited tools available to it, there is a question regarding the Authority's willingness to undertake enforcement and compliance activity. Legislative reform designed to facilitate the preferred mechanisms would also provide an opportunity to temper the legislative reliance on self regulation and the message this ends to the Authority regarding its role. We consider that a change in this message is critical to achieving the appropriate enforcement and compliance culture within the Authority.

We suggest that if the use of codes is to be maintained, they should only be used through a truly co-regulatory model designed to promote effective compliance monitoring. Compliance with codes should be a condition of licence and there should also be requirements on signatories to promote the existence of the code or codes. In the banking sector, code compliance is delivered through an independent code monitoring body comprised of an independent Chair, a consumer representative and an industry representative. The Code Compliance Monitoring Committee receives complaints relating to Code breaches but importantly also has the capacity to conduct its own motion inquiries regarding code compliance. There is also a system of annual self

reporting of compliance by Code signatories. We commend this model for the telecommunications industry.

We agree with the Draft Report that there are benefits to increasing reliance on industry standards and/or service provider determinations. Advantages include the ability for the Authority to take quicker enforcement action in case of non-compliance. To that end, we support the recommendations on pages 29 and 30 of the Draft Report to improve the legislative framework for industry standards and service provider determinations.

However, we believe that if industry standards and service provider determinations are going to be effective, then the Authority also needs access to an improved range of enforcement and compliance tools. We support the proposals on pages 31 and 32 of the Draft Report that the Authority should be provided with the power to issue substantiation notices and improved surveillance and information-gathering powers. Substantiation powers would be particularly useful in relation to the Draft Report's proposal to improve advertising practices, as the Authority would be able to require a service provider to substantiate an advertising claim rather than be required to prove the claim is false. Improved surveillance and information gathering powers would enable the Authority to undertake regular compliance audits which have been effective in other sectors, such as energy.

So as to effectively implement the proposals in the Draft Report, we also suggest that the Authority review its enforcement and compliance policies with the aim of:

- the setting of compliance and enforcement priorities;
- establishing a compliance and enforcement framework that specifically contemplates court and other administrative legal action;
- engendering a culture that supports this type of action; and
- providing necessary resources to support this function.

Despite our support for the improvements to the regulatory model outlined in the Draft Report, we maintain that if the Authority is serious about improving telecommunications customer service issues, it should recommend in its Final Report that consumer protection principles be legislated in the *Telecommunications Act 1997* (Cth) (**the Act**), rather than rely upon improved operation of industry standards and service provider determinations alone. We again refer the Authority to Choice and Galexia report addressing the poor standard of consumer protection in the telecommunications industry and particularly the recommendation that a set of core consumer protection principles be included in the telecommunications legislation.¹ Any subordinate regulatory instrument—whether it be a code, an industry standard or a service provider determination—should be aligned with legislated customer protections in the Act. This would ensure that any self-regulatory or co-regulatory approaches align with the Government's policies and the community's expectations for the industry.

Governance structure of the TIO

We strongly support the recommendations in the Draft Report relating to the governance structure of the TIO. As outlined in our initial submission, we have long held reservations

¹ Galexia and Choice, *Consumer Protection in the Communications Industry: moving to best practice*, October 2008 pp 20-21

regarding the two-tiered governance structure of the TIO, which we believe compromises the scheme's independence and effectiveness. We welcome the Authority's recommendation that the TIO board initiate a governance review and collapse the current two-tiered governance structure into a single board, constituted by an equal number of industry and consumer representatives with an independent Chair.

However, we believe that legislative guidance will be required to achieve this and that the regulatory framework, as with other sectors, should include a mechanism for the regulator to approve industry external dispute resolution schemes in line with certain criteria including a best-practice governance structure. Regulatory oversight would also provide confidence to the community generally, as well as telecommunications service providers, that the EDR scheme meets best practice principles. We commend to the Authority the approach taken by ASIC in effecting approval of schemes under the Corporations Act—namely the production of regulatory guidance regarding the standards to be met by a scheme/s in order to obtain approval

We also support the related recommendations of the Draft Report, including legislative amendments:

- prohibiting service providers that are not members of the TIO from operating in the telecommunications market; and
- requiring all service providers to be a member of an industry based external dispute resolution scheme that is approved by the Authority.

Please contact Sarah Wilson or Gerard Brody on 03 9670 5088 or email sarahw@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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