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By email: garry.croker@dbcde.gov.au

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Dear Mr Croker,

Review of Consumer-related Industry Code Processes – Issues Paper for Public Consultation

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a submission to the Department of Broadband, Communications and the Digital Economy (**DBCDE**) on the Review of Consumer-related Industry Code Processes Issue Paper (**Issue paper**). We apologise for the delay in making our submission.

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.

Introduction

The current consumer protection framework for telecommunications in Australia is based on a form of co-regulation. Rather than consumer protection rules being set in legislation, the Telecommunication Act 1997 (**the Act**) promotes self regulation. In practice, this is done through industry participants developing and registering industry codes of conduct for consumer protection and operational issues. The independent regulator, the Australian Communications and Media Authority (**ACMA**), is tasked to monitor the codes of conduct and, at least in theory, enforce non-compliance.

However, we suggest that self regulation in the telecommunications industry has failed Australian consumers in significant respects. Industry codes have been ineffectual in delivering an appropriate 'baseline' in consumer protection and compliance culture. This is reflected not least in the twin shortcomings of protracted development process and poor take up once complete.

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This problem is compounded by the overly *laissez faire* approach taken by the industry regulator, to the extent ACMA's approach may be attributed to the directive supporting self-regulation in the Act. We suggest this underlines the case for legislative reform. We note, however that the Act also requires effective outcomes. We suggest that this element of the Act could support a more hands on and innovative approach by ACMA to its compliance and enforcement jurisdiction. Whilst we strongly welcome recent ACCC action in relation to telecommunications consumer protection problems, as a matter of policy, it ought not to be the case that the ACCC continue to undertake the overwhelming majority of telecommunications enforcement activity when there is an industry-specific regulator in place.

General comments

Before moving to make specific responses to the questions raised in the Issue Paper, we wish to make a more general point about the scope of the review. In short, we consider the scope of this inquiry is too narrow. Whilst there is no question that the operation of the code process is one of the causes of the consumer protection problems currently extant in the telecommunications industry, the problems are compounded by the interaction of different parts of the regulatory framework. Thus to have the best chance to properly identify the source of consumer protection problems and pose effective solutions, a broader look at the entirety of the framework is required, including the legislation and the powers and the function of the regulator.

In October 2008, Choice and Galexia released a report addressing the poor standard of consumer protection in the industry, titled *Consumer Protection in the Communications Industry: Moving to best practice*. The report which is referred to in the Issues paper, made six recommendations including developing a set core consumer protection principles in the telecommunications legislation, aligning the telecommunications code development processes to industry codes in other sectors, including independent code compliance monitoring, improved dispute resolution mechanisms and more power to independent regulators. .

Consumer Action endorses all recommendations in the Choice and Galexia report and call for a broader review of the regulatory framework. Below we have provided some additional comments to the report and the concerns addressed in the Issues paper to assist in achieving the outcomes of the government's plans to reform consumer protection in the telecommunications industry.¹

1. Determining the need for a code

Question 1.1: In what circumstances is a consumer-related industry code the most appropriate form of regulation?

Question 1.2: Who should have input into the decision to develop or review a consumer-related industry code?

It is difficult to provide a direct answer to questions 1 and 2 as any answer suggests that an appropriate code development and compliance framework is currently extant. In our view this is not the case for consumer protection codes in the telecommunications industry. Consumer

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

protection issues could be appropriately addressed in a code where other regulatory settings are right, in particular: the legislation sets out a clear set of consumer protection principles and base level of protection; independence and the capacity for genuine stakeholder input are a feature of the code development process; there is an independent compliance monitoring body in place; and the relevant regulator is sufficiently empowered and possesses a strong enforcement culture to take action where serious or systemic potential breaches are identified. According to the Issues paper, the current regulatory regime was expected to provide benefits such as greater flexibility and timeliness in responding to changes. However, it has failed in this objective, instead allowing for a system where code development is protracted and resource intensive, yet consumer protection is not given effective priority and problems related to consumer issues have developed and even flourished.

The Issue Paper notes that Part 6 of the Act provides for the communications industry to develop and implement codes of conduct for consumer matters. It notes that,

'A code may be submitted to ACMA for registration and if ACMA is satisfied and the code meets stipulated criteria, it is registered and included on ACMA's register of Industry codes.'

However, for a number of reasons, these codes have been ineffective in providing even basic levels of protection to some consumers. One key reason is the absence of any enshrined customer protection principles in the Act in contrast to other sectors such as financial services. Without the support of effective legislation there is no guidance to industry participants developing codes and to ACMA which registers the code on minimum levels of consumer protection.

A further issue highlighted by the Choice and Galexia report where the telecommunications industry again falls short of other industries is in the promotion of industry and consumer codes. The report notes as an example, the inadequacy of a brochure published by the Communications Alliance which claims to provide a unified voice for the communications industries in March 2007 titled 'An introduction to Consumer Codes'. It summarises that;

'The brochure briefly summaries seven codes and provides contact details for the Communications Alliance. It mentions the Telecommunications Industry Ombudsman (TIO) and other relevant bodies without providing contact details. It states that 'Once a Code is registered, ACMA can direct service providers to comply with its terms'. It does not claim that providers are otherwise compliant with Codes and it does not mention or discuss code signatories.'

It also reports,

'Industry participants in the telecommunications sector do not generally promote their compliance with the codes. There is no operational 'compliance mark' and the websites of major providers do not discuss codes or list the codes they have signed. The TIO website briefly lists some relevant codes (last updated 2005) with links to the Communications Alliance site, but again, does not mention or discuss signatories.'

The biggest reform needed for a meaningful consumer-related industry code to be effective is to amend the current Act to include consumer protection provisions. The current multitude of codes should be replaced by a limited number of comprehensive codes which through the guidance of

effective legislation protects consumer rights in the telecommunications industry. There should also be requirements on signatories to promote the existence of the code or codes.²

2. Participants in the code drafting process

Question 2.1: Who should be involved in the drafting process, and what form should their participation take?

The Issues paper itself notes that although the peak industry body the Australian Communications Industry, Communications Alliance has established working committees that comprise of industry representatives and consumer groups to develop industry codes, some consumer groups do claim that there has been a lack of opportunity to provide meaningful input into the code drafting process.

The Issues paper also notes the lack of requirement to include government or representatives from the Telecommunications Industry Ombudsman (**TIO**) on working committees to draft industry codes. It may be useful to include ACMA and the TIO in the code drafting process as they are, as noted in the Issues paper, 'intrinsically involved in complaint handling and enforcement activities.' Whilst, the Issues paper also raises the possible concern that the involvement of the government may detract from the independence of any working committee, it is our view that an effective and well balanced industry code of conduct can only be developed if there are meaningful inputs from all parties involved such as industry, consumer and government.

It is also the case that the process is resource intensive. Many codes have taken well in excess of twelve months to develop. During the development process, consumer groups that do participate must dedicate significant time and human resources to participate in working group processes. Consumer representatives are generally significantly outnumbered by industry participants and work without the benefit of an over-arching set of principles for consumer protection or the ability to meaningfully input to issues such as code scope, benchmarks for key protections and approach to compliance.

This situation needs to be reversed. We suggest consideration be given to a range of possible alternative approaches.

- Code development and review where the regulator 'holds the pen' with industry, consumer and other relevant stakeholder participating in regulator-convened working groups; OR
- Code development involving an independent code developer with industry, consumer and other relevant stakeholders participating in working groups or via submission. Independent review to be conducted on a regular basis (no less than tri-annually) via a submission process;

AND

- Independent code compliance monitoring (as outlined above).

² Galaxia and Choice, Consumer Protection in the Communications Industry: moving to best practice, October 2008 pp 7-8

Regardless of which approach is chosen we suggest it should exhibit the key characteristics of genuine input by relevant stakeholders, independent review and effective compliance monitoring.

3. Timing

Question 3.1: What is an appropriate time frame for the development of new consumer-related industry codes?

Question 3.2: Are there ways to streamline industry code development processes, including legal drafting processes?

Question 3.3: Should registered consumer-related industry codes be easily amended if required? How might this be achieved in a more timely way whilst achieving appropriate consensus?

The Issues paper notes that in the past, the code development process has been criticised for the length of time the process takes which in turn seriously undermines confidence in the process. It notes that the time delay between acknowledgement of a problem and a remedy to rectify it is actually put in place as the most disadvantageous for a consumer. We believe that this is a serious problem but acknowledge that the process can not be rushed as wide consultation among all parties can be time consuming but is crucial in determining an effective code. In our view, the development of overarching consumer protection principles and rights in the Act would assist to speed up the process as it would provide a framework for discussion. We also consider that improving the independence of the development process would assist making the process less adversarial. However, we do question the requirement of qualified legal drafters to write the code as this only increases the time delay, we note such drafters are not required in code development in other sectors.

The Choice and Galexia report also notes that under section 120 of the Act, changes to registered codes must be effected by the registration of a new code and not simply by amending the old code. This has led to an inefficient system of multiple versions of the same code. To add to the complexity many signatories of the old code have failed to sign for the new one. This has made it difficult for ACMA to not just monitor the multiple numbers of codes but also determine the signatories of the codes. Indeed the report has also noted that the more recent codes are less effective because they have fewer signatories. This paper acknowledges that the industry has gone part of the way into rectifying this problem by amalgamating the six codes relating to customer protection into the one Telecommunications Protection Code. However a more efficient system would be to allow the codes to be amended where there is universal agreement and need for change. Given the nature of the telecommunications industry they will need to be regularly monitored and updated to keep in line with changes in technology.³

4. How should the costs of code development be met?

Question 4.1: Who should be responsible for paying for the costs of consumer-related industry code development?

Question 4.2: On what basis should any reimbursement be made?

³ Galexia and Choice, Consumer Protection in the Communications Industry: moving to best practice, October 2008 p.12

As noted in the Issues paper, since March 2006, Division 6A of Part 6 of the Act allowed for the costs of telecommunications to no longer be wholly borne by the industry body that develops the codes but established a scheme, administered by ACMA for the re-imbusement of the costs of development of telecommunications consumer-related industry codes. The reimbursement scheme is funded through annual carrier license charges and only certain types of expenses directly attributable to the code development process are refundable. Refundable and non-refundable costs are determined.

In the past, consumer bodies involved in the code development process were funded through a grant under section 593 of the Act. In view of new arrangements for consumer advocacy in the sector, it is not clear how consumer costs of participation in code development will be met.

In other sectors, ensuring appropriate stakeholder involvement is viewed as part of the cost of code development. In the development of energy codes in Victoria, consumer participants' costs were reimbursed and a sitting fee paid by the regulator. In the banking sector, it is common for funding to be provided for the development of a joint consumer submission by the industry body.

We suggest that a similar approach is appropriate for the telecommunications sector. Thus costs of consumer participation should be borne by the regulator or industry peak body depending on the code development model chosen. Such an approach appropriately recognises the expertise brought by consumer advocates to the code development process as well as the time and human resource dedicated to it.

5. Consultation on Draft Codes

Question 5.1: How should broader community, industry and government consultation on draft consumer-related industry codes, or codes undergoing review, be undertaken?

Question 5.2: Should submissions and comments made on a draft consumer-related industry code be made publicly available (subject to considerations of potentially defamatory or commercial-in-confidence material)?

It is important that consumers, the industry and government are consulted on draft consumer-related industry codes, or codes undergoing review and this has been dealt with by this paper. Please refer to our previous comments.

We consider that any submissions or comments should be made publically available for all parties and the general public to ensure transparency and a fair and legitimate process. There could be an exception granted for genuinely commercial in confidence information, however this information should be specifically identified and not relied on as a reason to exclude contributions in their entirety.

6. Code monitoring, compliance and enforcement

Question 6.1: What is the most effective way to monitor compliance with consumer-related industry codes?

Together with the code development process, the issue of code compliance monitoring requires some fundamental re-thinking.

The Act, as with consumer protection, is severely lacking in any principles to guide code compliance monitoring. Hence there is no clarity or direction in determining compliance nor, as noted in the Choice and Galexia report, is there a specific test of 'failure'. This gap needs to be addressed as a matter of urgency, perhaps through the development of guidelines by the relevant regulator in consultation with industry, government and consumer stakeholders.

Currently, there are two de facto code compliance monitors, the Industry Association, CA and the regulator ACMA. When monitoring industry codes, CA as a membership body has a clear conflict in monitoring code compliance and delivering sanctions for failure in this regard. Its effectiveness is further hampered by the fact that its 'Code Administration and compliance scheme only applies to signatories of the industry codes. Given most codes have 2-3 signatories or in some cases none, this is a significant short-coming..

ACMA also appears to be hampered in its compliance efforts. The Issues paper notes that ACMA can act in response to 'code-related complaint statistics' provided by the TIO. In practice it appears ACMA does not do so, with little or no apparent action in the face of climbing complaint numbers in a range of categories. TIO complaint statistics are an excellent source of data for the regulator; however an approach that relied solely on complaints where a breach of a code is specifically found in the course of resolving complaints would be misguided. Such an approach misunderstands the role of the TIO as a body that resolves complaints, as distinct from a code monitoring body. In other words, it is likely that as an external dispute resolution body, the TIO will only formally find that a code is breached where it is required to do so to resolve a complaint. This does not mean a breach has not occurred in other cases but rather that resolution of a complaint did not require that question to be determined.

In addition to these specific issues, it is clear that in other industries there is ample precedent for the existence of a compliance monitoring body that is separate from the regulator. This can be seen for example in the codes relating to banking, mutuals and insurance.

As noted above, in view of past failures and short-comings, we suggest that if codes are to be a feature of the regulatory framework going forward, it should be on a genuinely co-regulatory basis supported by effective compliance monitoring. In the banking sector this 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. Given the poor track record of the codes development process, commitment to independent code monitoring would send an important signal regarding a change in industry attitude to compliance.⁴

Question 6.2: How should compliance be enforced and what, if any additional enforcement options or powers would assist the regulator to enforce compliance?

⁴ Galexia and Choice, Consumer Protection in the Communications Industry: moving to best practice, October 2008 pp 7-8

Question 6.3: Should industry have to report publicly on its own consumer-related industry codes?

Section 106 of the Act provides that 'compliance with an industry code is voluntary unless ACMA directs a particular participant...to comply' with a registered code'. This ensures that contrary to the claims in the Issues paper, registered codes are not binding on industry participants. ACMA states that it 'retains the discretion to decide where an individual matter falls within the approach and may decide it is appropriate to consider urgent matters at higher categories, on a case by case basis'. However, as noted in the Choice and Galexia report, 'In practice ACMA (including its predecessor the Australian Communications Authority) has made only three directions under Section 121 of the Act regarding code compliance during the ten years that the Section has been operational'.⁵

In view of this fact, together with the active enforcement role taken by the ACCC in the telecommunications sector, there seems to be a strong argument to consider moving the function of enforcing compliance to the ACCC. This would have the added advantage of making available the new enforcement tools due to be provided to the Australian Competition and Consumer Commission, including banning orders, substantiation notices, 'name and shame' and infringement notices through the future national consumer laws. We note also the ACCC has provided guidance regarding appropriate content for consumer codes. It already has a relatively strong culture of enforcement and has existing code experience through the franchising, oil and other codes within its jurisdiction. Finally we note that such a move would likely reduce complexity and confusion for industry members given the current dual enforcement role.

Please contact Sean Carroll or Catriona Lowe on 03 9670 5088 or at sean@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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⁵ Galexia and Choice, Consumer Protection in the Communications Industry: moving to best practice, October 2008 pp 10-11