



16 September 2010

**By email: [reconnectingthecustomer@acma.gov.au](mailto:reconnectingthecustomer@acma.gov.au)**

Manager, Public Inquiry Section  
Australian Communications and Media Authority (**ACMA**)  
PO Box 13112, Law Courts  
Melbourne Victoria 8010

Dear ACMA,

**"Reconnecting the Customer"- ACMA public inquiry consultation paper- Consumer Action Law Centre submission**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a submission to ACMA on the above consultation paper (**ACMA Inquiry**).

**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. Amongst other work, in 2008 we published a comprehensive report into the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (the **TPA**) and how they compared with international best practice provisions, looking at developments in the comparable jurisdictions of the United Kingdom, the United States, Canada and the European Union<sup>1</sup> and in 2005 we published (through our predecessor, the Consumer Law Centre Victoria) *Do the Poor Pay More?*, a report which examined access to various services for low income consumers and included an analysis of telecommunications services.<sup>2</sup>

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

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<sup>1</sup> Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, available at [www.consumeraction.org.au/publications/policy-reports.php](http://www.consumeraction.org.au/publications/policy-reports.php).

<sup>2</sup> Consumer Law Centre Victoria, *Do the Poor Pay More? – A research report*, January 2005, available at [www.consumeraction.org.au/publications/policy-reports.php](http://www.consumeraction.org.au/publications/policy-reports.php).

**Consumer Action Law Centre**

Level 7, 459 Little Collins Street Telephone 03 9670 5088  
Melbourne Victoria 3000 Facsimile 03 9629 6898

[info@consumeraction.org.au](mailto:info@consumeraction.org.au)  
[www.consumeraction.org.au](http://www.consumeraction.org.au)

## Response to the ACMA Inquiry - Broad Summary

Customer service is extremely poor in the Australian telecommunications industry, and has been for many years. Misleading advertising, unfair contract terms and deceptive sales practices are so common as to have essentially become the norm. The unacceptably high number of complaints to the Telecommunications Industry Ombudsman (**TIO**), although alarming in themselves, probably only reveal a small proportion of the problem. Consumer Action notes that this number rose 94.2% in 2007-08, yet would still contend that this represents the metaphorical "tip of the ice-berg".

Although frustrated by poor service delivery, the practical reality is that most consumers - particularly vulnerable consumers - are unlikely to carry their complaint through to the TIO. When one considers that ACMA then acts on only a very small proportion of TIO complaints, it becomes clear that the vast majority of poor trader practice in the Australian telecommunications industry goes unsanctioned, which in turn provides little genuine incentive for service providers to improve their performance. All of this contributes to poor ongoing outcomes, and leaves consumers with little hope of improvement in the short to medium term.

Consumer Action prefaces its response to the ACMA Inquiry with the very strong view that the current regulatory framework designed to protect consumers of telecommunications services in Australia is fundamentally flawed. Reliance on the Telecommunications Consumer Protections Code (**TCP Code**) has not delivered acceptable outcomes for consumers. In light of this failure, Consumer Action believes that the current model of industry self-regulation promoted by the Telecommunications Act 1997 (**the Act**) should be abandoned, and legislative reform undertaken to move towards direct government regulation, and where appropriate, robust co-regulation.

Given Consumer Action's views on this matter, we have confined our responses to questions 11 and 22 of the ACMA Inquiry. These questions relate directly to the issue of regulatory reform, which Consumer Action contends is the core issue. Until such time as that occurs, structural deficiencies in the current framework will continue to inhibit effective consumer protection.

Finally, Consumer Action notes that 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 made six recommendations including developing a set of 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 calls for a broader review of the regulatory framework, and makes reference to the report in our responses below.

Our responses to those questions are outlined below:

### **Q 11. What changes in:**

- (a) current regulatory practice, and**
- (b) the regulatory framework, including aspects of the co-regulatory scheme such as the TCP Code and the TIO scheme,**
- would best support improved or best practice customer service?**

First - the current Act must be amended to include consumer protection provisions. This is a basic first step in strengthening the role of industry specific consumer protection in telecommunications. Consumer-related industry codes can only be effective if backed by effective legislation. There is also a need for rationalisation of codes in telecommunications - multiple, various codes should be replaced by a finite (and limited) number of truly comprehensive codes, to protect consumer rights. Compliance with the codes should be a condition of licence and there should also be requirements on signatories to promote the existence of the code or codes.<sup>3</sup>

In addition to consumer protection provisions, the Act should enshrine clear principles to guide code compliance monitoring. The Choice and Galexia report notes that there is currently no specific test of 'failure' to guide compliance monitoring in telecommunications. This obvious deficiency should be urgently addressed. It is suggested that guidelines could be made by the relevant regulator in consultation with industry, government and consumer stakeholders to further give shape to the matters outlines in the legislative principles.

Beyond amending the Act, attention must also be paid to code compliance monitoring, which requires fundamental reform.

Currently, there are two de facto code compliance monitors, the Industry Association, Communications Alliance Limited (**Communications Alliance**) and the regulator ACMA. It is clear that Communications Alliance, as a membership based industry body, labours under an irreconcilable conflict of interest in its code compliance monitoring function. This fundamental conflict has been recognised in other industries, such as banking and insurance, which have moved to ensure independent compliance monitoring of their codes as they recognise it is crucial to legitimacy. Beyond this obvious short-coming, the voluntary nature of the codes, and the low number of signatories, impose severe limitations on the intended "self-regulation".

ACMA can act in response to 'code-related complaint statistics' provided by the TIO. ACMA does not appear do so, and almost no action has been taken in the public domain, despite climbing customer complaint numbers in a range of categories. We suggest it is a fundamental regulatory error for ACMA to confine its attention to complaints where a breach of a code is specifically found by the TIO.

First, such an approach appears to misunderstand the role of external dispute resolution body - which is to resolve complaints. Thus the TIO will only formally find that a code is breached

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<sup>3</sup> Galexia and Choice, *Consumer Protection in the Communications Industry: moving to best practice*, October 2008 pp 7-8.

where it is required to do so in order to resolve a complaint. In many other cases, breaches may well have occurred - but resolution of the matter may simply not have required the issue to be determined - indeed it may be counterproductive in a dispute resolution context to do so.

Secondly, by restricting its focus to code breaches found rather than potential code breaches ACMA denies itself a rich source of data regarding current and emerging market concerns. In examining market conduct, we suggest ACMA should concern itself with the number of potential code breaches reported by the TIO and also systemic issues reported. This and other sources of data such as market studies and research should guide ACMA in its enforcement and compliance priorities.

We suggest also that the setting of enforcement and compliance priorities should form part of a broader review by ACMA of its approach to compliance and enforcement - with the aim of:

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

We note that the Australian Energy Regulator (**AER**) has recently publicly consulted regarding its proposed compliance and enforcement framework and we commend this process to ACMA. Consumer Action's submission to the AER regarding its enforcement and compliance framework is annexed to this document as Annexure A. This submission in turn draws on the work in our report into the consumer protection provisions of the TPA referred to above.<sup>4</sup> A copy of the relevant report chapter is also annexed as Annexure B. In both instances, Consumer Action emphasises that best practice in compliance and enforcement involves using a range of regulatory tools, ensuring that appropriate regulatory methods are used depending on the circumstances, and ensuring that enforcement activity is effective in deterring business non-compliance.

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. 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. Commitment to independent code monitoring would send an important signal regarding a change in industry attitude to compliance.<sup>5</sup>

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<sup>4</sup> Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, available at [www.consumeraction.org.au/publications/policy-reports.php](http://www.consumeraction.org.au/publications/policy-reports.php).

<sup>5</sup> Galexia and Choice, *Consumer Protection in the Communications Industry: moving to best practice*, October 2008 pp 7-8.

**Q 22. What changes in:**

**(a) current regulatory practice, and**

**(b) the regulatory framework, including aspects of the co-regulatory scheme such as the TCP Code and the TIO scheme,**

**would best support improved or best practice complaints handling service?**

Consumer Action has long held reservations regarding the two-tiered governance structure of the TIO, which we believe compromises the scheme's independence and effectiveness.

As with any industry-based external dispute resolution scheme, the independence of the TIO is critical to its success. This is recognised in all existing benchmarks relating to industry-based EDR, including the (then) Department of Industry Science and Tourism, Benchmarks for Industry-based external dispute resolution schemes, 1997 (the DIST Benchmarks) and Regulatory Guide 139, produced by the Australian Securities and Investments Commission.

Consumer Action believes that ACMA should actively encourage the TIO to work towards collapsing the current two-tiered governance structure into a single board, constituted by an equal number of industry and consumer representatives with an independent Chair.

Please contact Zac Gillam or Catriona Lowe on 03 9670 5088 or at [zac@consumeraction.org.au](mailto:zac@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



Zac Gillam  
Senior Policy Officer



Catriona Lowe  
Co - CEO