

COMMUNICATIONS
ALLIANCE LTD



SUBMISSION TO:
REVIEW OF CONSUMER-RELATED
INDUSTRY CODE PROCESSES

May 2009

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1 EXECUTIVE SUMMARY

Communications Alliance welcomes this opportunity to make a submission to this review.

Based on experience as facilitator of industry codes over more than a decade, Communications Alliance has provided constructive responses to the questions posed and also makes a number of general observations.

We do not debate the underlying premises for the Review which appears to have been the genesis for the paper, however, we do say that those premises should not be uncritically accepted and acted on without validating evidence.

The underlying premise that reforming processes should help 'result in codes that are more focused on achieving positive outcomes for consumers' appears to assume that existing codes do not/have not achieved positive outcomes for consumers. We submit that it is undeniable that a significant body of consumer protections have been developed and registered with the ACMA since 1997. Neither the Issues Paper, nor the documents cited as the source of criticisms of the process, details how the current consumer-related codes allegedly fail to achieve positive outcomes for consumers.

We submit that, in the general context of Part 6 and in specific response to Question 1.1 of the Issues Paper, there should not be a starting presumption that the response to any identified consumer-related issues is an Industry Code. Rather, the 'six principles of good regulatory process' contained in Recommendation 7.1 of the Productivity Commission's January 2006 report 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business' should be applied.

We submit that, in response to Question 3.3, that there may be opportunity to provide greater flexibility to the Part 6 process by a legislative amendment to s 120 to enable variations to registered codes in specific circumstances.

In respect of issues raised which pertain to the processes for code development under the auspices of Communications Alliance, we submit that the current processes are robust. However, even with all the good intent and good faith brought to the table by stakeholders, challenges are inherent in execution of the processes in light of the degree of contention of the subject-matter amongst stakeholders and the need to proceed on a consensus-basis.

We submit that the setting of timeframes for completion of Codes is not an appropriate response. While it may be seen as a mechanism for addressing some of the execution issues, we submit that it should not be done without a consideration of adjusting the expectations of stakeholders– for example, range and time for consultation, moving from a consensus basis, and moving a detailed prescriptive code to high-level principles.

It is submitted that in developing responses to this Review, it is relevant to put the development and registration of consumer-related codes into both a current and future context.

The current number of consumer-related codes on the ACMA register is 5¹. All other 18 codes on the register developed under the auspices of Communications Alliance are operational codes of practice.

Two of the currently- registered consumer-related codes developed under the auspices of Communications Alliance are ‘new’ codes since 2006.²

The focus on development of consumer-related industry codes under Part 6 has seen a decline at Communications Alliance over the last few years. The decreased activity on Code development is partly explained by the fact that the matters identified in s 113 of the Telco Act as relevant matters

¹ All but 2 of these Codes (the Internet Industry Spam Code of Practice and the Australian eMarketing Code of Practice March 2005) have been developed under the auspices of Communications Alliance.

² The ‘new’ Codes developed since 2006 are the *Information on Accessibility Features for Telephone Equipment (2006)* and the *Mobile Premium Services Code (2007)*. The *Calling Number Display Code (2007)* is a revision of earlier versions and the *Telecommunications Consumer Protection Code (2008)* is a consolidation/re-drafting of a number of codes without having altered the obligations in those individual codes.

for Codes have been essentially dealt with in the current registered codes. It is possibly also partly explained by the recognition that industry codes of practice bring additional compliance costs, and that for emerging services in particular other responses such as Fact Sheets and Guidelines have been more appropriate.

By way of future context, since the release of the Issues Paper, the Government has announced the establishment of NBN Co and has released a Discussion Paper on regulatory reform for the NBN environment.

The Regulatory Reform Discussion Paper says (emphasis added):

*'The Government therefore intends to consider in 2011 whether to look again at its overall approach to regulation in a convergent environment. A key theme in these considerations will be **the scope for winding back industry-specific regulation** once the National Broadband Network is firmly established as an open access, wholesale-only, national network. This could include the ongoing roles for Part XIB and XIC **and wider consumer protection arrangements....'***

It is submitted that the framework for code development put in place in 1997 and as it stands under Part 6 is clearly referenced by these statements. The future scoping of 'winding back industry-specific regulation' and the 'wider consumer protection arrangements' will necessarily entail consideration of whether this framework will be the appropriate mechanism for addressing consumer-related issues in the broadband environment

It is also submitted that the Productivity Commission's reports on Regulatory Red Burden, and the Consumer Policy Framework which result in the proposals for an Australian Consumer Law support a policy direction

away from industry-specific regulation to generic consumer protection legislation³.

It is our submission that there should not be recommendations made for reform of existing processes which may impose additional cost on industry without a factual basis and assessment of the outcomes delivered by current codes and the conducting of a Regulation Impact Statement.

Further, any responses should be proportionate to the degree of likely Code development under Part 6, and potential regulatory changes under the Regulatory Reform agenda for the NBN environment. It is therefore submitted that there be 'no fundamental change' to the current legislative framework (subject to the streamlining opportunities) unless and until there is clarity of these matters.

2 INTRODUCTION

Communications Alliance is the peak industry body for the Australian communications sector. Its mission is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry and foster the highest standards of business behaviour.

We acknowledge that the Terms of Reference of the Review relate only to the 'processes associated with consumer-related industry code development as specified under Part 6 of the Act.'

Explicitly excluded from the Review are wider aspects including the objects of the *Telecommunications Act 1997* (the *Telco Act*) and the telecommunications co-regulatory regime as a whole.

³ Communications Alliance submission to the Australian Consumer Law paper in February 2009 submitted that the telecommunications industry should obtain the full benefit of the proposed rationalization and harmonization by the removal of the duplication of consumer protection laws for the industry under the Telecommunications Act 1997 and the Trade Practices Act 1974.

We note that reforms recommended from the Review will be provided to the Minister and that the reforms will address any identified deficiencies in the code development and associated processes specified under Part 6 of the Act. As a result of these reforms, other changes may also be necessary to ensure that the approaches to code administration taken by ACMA and the industry body, Communications Alliance, are aligned with the provisions of Part 6 of the Telco Act.

As a major stakeholder in the Review and in the outcome of the recommendations of the Review, Communications Alliance will be making constructive observations in response to the questions posed throughout the paper.

However, in our role as a major stakeholder, we consider it critical to make some general observations –to ensure a balanced record and to provide a current and future context to code development.

3 RESPONSES TO QUESTIONS

1.1 In what circumstances is a consumer-related industry code the most appropriate form of regulation?
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Communications Alliance submits that there should not be a starting presumption that the response to any identified consumer-related issues is an industry code.

We endorse the recommendation in Chapter 7 of the Productivity Commission's January 2006 report '*Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*' regarding the 'six principles of good regulatory process'.

Additionally, the research report prepared in 2008 for Communications Alliance *Preparing for the Broadband World: Fostering Consumer Confidence through Collaboration and Partnerships* noted the following:

'...there was broad consensus among the stakeholders consulted that the co-regulatory framework had brought substantial benefits to the

Australian telecommunications sector, and was very largely successful. One of the industry stakeholders called for some simplification in the regulatory structures as convergence matures, particularly as telecommunications providers increasingly become content providers. Stakeholders across sectors stressed the importance of competition to innovation, and therefore to ensuring sufficient diversity in the marketplace for the needs of diverse consumers to be met. The stakeholders were all in agreement that regulation should be very much a last resort measure, to be used only where competition and co-regulatory arrangements failed.'

In the specific context of codes applicable to telecommunications service providers, section 113 of the *Telco Act* sets out examples of 'matters that may be dealt with by industry codes..'

It is arguable that industry codes developed over the last 12 years, under the auspices of Communications Alliance, and other industry associations do deal with the matters specified. That is, the foundation consumer protections, as intended under the regime have been developed.

In 2009, therefore, in determining whether additional consumer-related industry codes are an appropriate regulatory response, an assessment needs to be made against the framework of existing code and legislative consumer protections

1.2	Who should have input into the decision to develop or review a consumer-related industry code?
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Input from all identifiable relevant stakeholder interests in the objective and outcome of a consumer-related industry Code is desirable at the earliest stage and in advance of commencing development.

2.1	Who should be involved in the drafting process, and what form should their participation take?
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From experience, Communications Alliance is strongly of the view that the actual drafting process needs to be undertaken by professional drafters and not be done by a committee.

A small Steering Group of stakeholder representatives should provide input on drafting instructions and seek and provide feedback from their constituency bases on drafts.

3.1	What is an appropriate time frame for the development of new consumer-related industry codes?
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From experience, Communications Alliance is of the view that it is not possible to provide an 'appropriate' time-frame for the development of Codes under Part 6.

A timeframe which provides a timely response to the issue which the Code is addressing is the overall objective but experience at Communications Alliance is that what is 'timely' and "appropriate' is dependent on a number of contingencies.

The processes in place for development of consumer-related codes at Communications Alliance are founded on representation of all relevant stakeholder interests, broad consultation, and consensus outcomes⁴.

Projects to develop industry codes are managed along recognized project management principles with the objective of 'on-time and on-budget' delivery.

It is the experience of Communications Alliance that all stakeholders come to the table with good intent and in good faith to achieve collaborative outcomes in a timely fashion.

⁴ It is relevant to note that the Operating Manual processes go further than is required under the *Telco Act*. Section 117 of the *Telco Act* requires the ACMA to be satisfied that specific regulators and associations – including a representative consumer association – have been consulted in the development process. The Working Committee process goes beyond consultation and actually provides for the inclusion of those stakeholders in the development process.

However, the 'on-time' delivery of the project can be challenged for any number of reasons, including:

- (i) the ability of stakeholders to provide resources;
- (ii) the nature of the subject-matter and the degree of contention between stakeholders;
- (iii) the requirement for a consensus outcome. It is inevitably a process which takes time, and the challenge for the facilitator is to balance the achievement of a timely outcome (as agreed in the project plan) with the requirement for representatives to ensure their constituency base is accepting of a proposed outcome so that Working Committee consensus can be reached. Codes under Part 6 are historically extremely prescriptive which also contributes to extended timeframes because of protracted discussion over the detail of the prescriptions.

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

From experience, the impacts on timelines comes not from legal drafting processes but from other pressures associated with consensus, requirements for registerability of codes, stakeholder expectations as to process and consultation, and increasing regulator/stakeholder involvement in the process.

A move away from expectations for prescriptive detail to shorter and high-level principle documents would also assist in streamlining.

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

Communications Alliance supports greater flexibility in the amendment of registered codes. Amongst other things, it provides greater efficiency in

being able to ensure that codes are responsive to changing industry and consumer needs.

One possible mechanism would be a legislative amendment to s 120 to enable variations to registered codes in specified circumstances. Codes should be replaced rather than varied in cases of substantial or major content amendment.

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

Industry currently funds the costs of consumer-related codes. Before the introduction of Part 6A of the *Telco Act*, CA paid for the costs of consumer-related industry code out of its revenues from membership fees. With the reimbursement provisions, industry still funds the development via carrier licences.

A more equitable approach would be contribution from all stakeholders who seek development of a consumer-related code, including consumers and Government.

4.2 On what basis should any reimbursement be made?

This question requires review of reimbursement provisions of the *Telco Act* and justifies a more extensive consideration.

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

Under s 117(g), (h), (i) and (j) of the *Telco Act* the ACMA must be satisfied that an industry association has met obligations of consultation with identified entities.

Communications Alliance has previously recommended that the 'Certificate of Mandatory Consultation on industry code' ('the Certificate') in Appendix C of the ACMA document '*Developing Telecommunications Codes for Registration – A Guide*' should be reviewed and revised if necessary.

As currently drafted in 2 Parts, it is the view of Communications Alliance that the Certificate may go beyond the requirements for consultation under those sections.

It would be valuable to develop a set of Guidelines to set expectations for meeting the obligation of 'consultation'.

Comments made in Chapter 7.3 of '*Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*' are applicable to the development of Guidelines.

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)?

Communications Alliance is of the view that there is merit in this suggestion.

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

The actual method of monitoring compliance with codes will depend on the subject-matter of the Code and the practices with which it is concerned.

With emerging services involving both carriage and content service providers, there is increasing emphasis on enforcement of obligations through contractual arrangements between the providers.

The ACMA has recently undertaken audits to determine compliance with particular codes, which appears to have delivered beneficial results.

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

Communications Alliance notes that the ACMA is to be given the power to issue infringement notices.

It is our submission that there should not be any additional enforcement options or powers conferred without a Regulation Impact Statement.

6.3 Should industry have to report publicly on its own compliance with consumer-related industry codes?

Communications Alliance supports increased compliance and enforcement, but would not support increasing any reporting requirements on suppliers without assessing where some requirements could be eased.

This approach is consistent with the recommendations of the Productivity Commission in Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, January 2006.

Communications Alliance submits that more value would be delivered by a programme to promote a culture of compliance through training and on-line assessments. This is the approach currently being scoped in respect of compliance with the Complaint Handling Chapter of the TCP Code.

4 GENERAL OBSERVATIONS

4.1 Efficiency, effectiveness and responsiveness of processes for developing industry Codes of Practice under the auspices of Communications Alliance

The genesis for the Issues Paper is expressed to be the 'criticisms [that] have been made that the system of code development and associated

processes, including monitoring, review and enforcement, is not operating effectively'.

Communications Alliance supports this review of Code development processes and does not see that this is the forum for debating the legitimacy of those criticisms.

However, it submits that the underlying premise that code development processes under the auspices of Communications Alliance are not efficient, effective or response should not be uncritically accepted. In particular, there should not be recommendations to change processes which would potentially increase costs for industry without solid evidence to support the validity of such claims. At the very least, a Regulation Impact Statement should be undertaken to support any regulatory amendments.

As the facilitator of industry codes of practice over more than a decade, it is the experience of Communications Alliance that the processes which have been put in place are robust. They are founded on representation of all relevant stakeholder interests, broad consultation, and consensus outcomes⁵. The processes set out in the Communications Alliance

Operating Manual are open and transparent and available at http://www.commsalliance.com.au/__data/page/13103/Operating_Manual_June_2007.pdf.

Additionally, projects to develop industry codes are managed along recognized project management principles. A Project Plan is prepared including requirements relating to scope, project change management, budget and timing. These are agreed to by the Working Committee up

⁵ It is relevant to note that the Operating Manual processes go further than is required under the *Telco Act*. Section 117 of the *Telco Act* requires the ACMA to be satisfied that specific regulators and associations – including a representative consumer association – have been consulted in the development process. The Working Committee process goes beyond consultation and actually provides for the inclusion of those stakeholders in the development process.

front and the project proceeds in accordance with the Plan. A copy of the Project Plan template can be provided if required.

It is the experience of Communications Alliance that the processes in place are in themselves sound and robust. It is also our experience that all stakeholders come to the table with good intent and in good faith to achieve collaborative outcomes in a timely fashion.

However, as noted earlier in this submission, the execution of the processes and delivery of the project can be challenged for any number of reasons, including:

- i) the ability of stakeholders to provide resources. The processes are labour and time intensive, and all stakeholders from time to time are challenged to provide resources;
- ii) the nature of the subject-matter and the degree of contention between stakeholders. Clearly, the more contentious the subject-matter and the more disparate the views on desired outcomes, the more challenge there is to executing the project.
- iii) the requirement for a consensus outcome. As with any project which involves the requirement to obtain consensus of stakeholders representing disparate perspectives, some projects run more smoothly than others. It is inevitably a process which takes time, and the challenge for the facilitator is to balance the achievement of a timely outcome (as agreed in the project plan) with the requirement for representatives to ensure their constituency base is accepting of a proposed outcome so that Working Committee consensus can be reached.

These observations apply equally to all codes or practice and to all collaboratively developed inter-operator outcomes at Communications Alliance, not just to consumer-related codes.

The recent experience in developing the Mobile Premium Services Code has highlighted another challenge to delivering an expeditious outcome –

namely, the degree of prescription provided by external stakeholders and additional consultation and oversight requirements by the ACMA. Whilst clearly these are welcome to deliver an outcome which meets stakeholder expectations and will be capable of registration by the ACMA, they do impact on timelines and reaching consensus.

We note the reference in the Issues Paper to indicative sources of criticisms of current processes. In the interests of a balanced record, Communications Alliance, and its precursor, ACIF did provide responses to 2 of the named reports: Choice & Galexia, and the Consumer Driven Communications paper. The responses are at **Attachment 1**.

In the context of whether the code protections for responsive for consumers, Communications Alliance notes that the development of the Telecommunications Consumer Protections Code, a consolidation of 6 codes into a single code, was in direct respect to calls by consumer groups for a single code to replace a multitude of codes⁶.

4.2 Positive outcomes for consumers

The Issues Paper is seeking input 'on ways to reform these processes to make them more efficient, effective and responsive. This should help result in codes that are more focused on achieving positive outcomes for consumers.'

This Issues Paper is not the forum for debating whether or not the TCP Code and other consumer-related codes have achieved positive outcomes for consumers.

However, it does need to be noted that neither the Issues Paper, nor the reports cited as sources of criticisms of processes, provide detail of how consumer-related codes developed under the auspices of Communications Alliance allegedly fail to achieve positive outcomes for consumers.

⁶ See Consumer Driven Communications: Strategies for Better Representation Final Report, December 2004.

Whatever may have been the challenges to executing Code development processes over the last decade, it is undeniable that a significant body of consumer protections have been developed and registered with the ACMA.

It is submitted that there should be no recommendations for reform which would potentially impose greater cost on industry without a factual basis and assessment of the outcomes delivered by this body of work.

At the very least, a Regulation Impact Statement should be conducted.

5 NATIONAL BROADBAND NETWORK: REGULATORY REFORM FOR 21ST CENTURY BROADBAND

As noted, we acknowledge the limited range of the Review on the processes for code development under Part 6 of the *Telco Act*, and the exclusion of broader perspectives.

Since the release of the Issues Paper, however, the Government has announced the establishment of a new company to build and operate a National Broadband Network. In conjunction with that announcement, a Discussion Paper on regulatory reform for the NBN environment was released.

Communications Alliance submits that the code development process review needs to be cognisant of the changing industry and regulatory environment and questioning of whether the framework for code development as it stands under Part 6 will continue to be a feature of the broadband environment.

The Regulatory Reform Discussion Paper says (emphasis added):

*'The Government therefore intends to consider in 2011 whether to look again at its overall approach to regulation in a convergent environment. A key theme in these considerations will be the **scope for winding back industry-specific regulation** once the National Broadband Network is firmly*

*established as an open access, wholesale-only, national network. This could include the ongoing roles for Part XIB and XIC and **wider consumer protection arrangements**....'*

It is submitted that the framework for code development put in place in 1997 and as it stands under Part 6 is clearly referenced by these statements. The future scoping of 'winding back industry-specific regulation' and the 'wider consumer protection arrangements' will necessarily entail consideration of whether this framework will be the appropriate mechanism for addressing consumer-related issues in the broadband environment

It is also submitted that the Productivity Commission's reports on Regulatory Red Burden, and the Consumer Policy Framework which result in the proposals for an Australian Consumer Law support a policy direction away from industry-specific regulation to generic consumer protection legislation.

Communications Alliance made a submission to '*An Australian Consumer Law: Fair Markets – Confident Consumers*' which was addressed to the fundamental issue of the duplication for the telecommunications industry in the area of consumer protection laws – that is, the telecommunications industry is subject to the generic consumer protection framework of the TPA as well as the telecommunications industry-specific framework for consumer protection under the *Telecommunications Act 1997*.

It is submitted that the matters raised by Communications Alliance in that submission are relevant to the future scoping of 'winding back industry-specific regulation' and the 'wider consumer protection arrangements' for the NBN environment.

Therefore, there should be no legislative changes which would result in additional industry-specific regulation. Subject to streamlining opportunities, the current framework should be retained in light of the potential regulatory reforms for the NBN environment.

Looking towards the NBN environment, it is likely to be the case that the mechanisms required to achieve good consumer outcomes need to be

different for the NBN environment than was required for the emerging competitive market in 1997 and with an increased emphasis on consumer empowerment as well as consumer protection.

In a research report obtained by Communications Alliance, it was stated that:

'Contemporary telecommunications services require a much higher level of consumer knowledge and technical understanding than earlier technologies. A shift in approach is needed, from shield and protecting consumers towards empowering them. ...Strengthening of cooperation between consumer representative bodies, government and regulatory agencies and industry are important..'

6 CONCLUSION

It is our submission that there should be 'no fundamental change' to the current legislative framework in the Telecommunications Act 1997 relating to consumer-related code development processes (subject to the streamlining opportunities) unless and until:

- i) there is an assessment of the costs to industry of any proposed changes, including an assessment of the outcomes and benefits delivered by the existing suite of consumer-related codes;
- ii) a Regulation Impact Statement is conducted; and
- iii) there is clarity around the potential regulatory changes under the Regulatory Reform agenda for the NBN environment – in particular, those industry-specific consumer protection issues identified in chapter 5 of the Discussion Paper National Broadband Network: Regulatory Reform for 21st Century Broadband.

ACIF INPUT TO AND COMMENTS ON THE REPORT CONSUMER DRIVEN COMMUNICATIONS: STRATEGIES FOR BETTER REPRESENTATION

ACIF welcomes the opportunity to provide a contribution the Final Report and Framework Document submitted by the Consumer Driven Communications Committee to the ACA in December 2004.

ACIF is committed to consumer participation in its processes. ACIF welcomes opportunities to review how to achieve effective collaborative work in delivering outcomes in a competitive telecommunications environment which is underpinned by a policy of the maximum use of industry self-regulation.

The following comments do not consider the totality of the In particular, it does not comment on the papers' positions relating to the Government policy of self-regulation in the telecommunications industry or recommendations relating to any other agencies.

The comments are directed only to factual matters relating to the Australian Communications Industry Forum (ACIF). The objectives of the comments are to

- 1) ensure that the factual public record relating to ACIF, its role and its work with consumer representatives is accurate and up to date; and
- 2) address any negative perceptions of ACIF, its role and commitment to consumer participation which may flow from a public record which may be seen to contain some gaps in its fact base.

Final Report: Recommendation

Self-regulation Recommendations

Recommendation 7: this recommendation does not acknowledge that the majority of the initiatives listed were those instituted by ACIF for the development

of the Consumer Contracts Code. Whilst that of itself is not a matter for major concern, it becomes so in the context of the overall theme of the documents, which is that 'the current self-regulatory regime has generally failed..' and 'The ACIF code regime has been a wholly inadequate vehicle for responding to marketplace failures.'⁷ In that context, if measures which ACIF has put in place are to be cited by the Report as benchmarks for Code development, then the record should be fair and acknowledge the genesis of those recommended benchmarks.

Recommendation 39: recommendation 39 relating to reform of the ACIF Consumer Advisory Council (CAC) does not mention that proposals for reform of the CAC were part of the ACIF independent consultants' review in 2004, and that the CAC has its own sub-committee to respond to these proposals. While the omission of itself may not necessarily be a cause for major concern, it becomes so in the context of the positioning of ACIF as a 'failed experiment' for consumer outcomes.' The fact that ACIF even has a Consumer Advisory Council should be a matter which is acknowledged as a positive contribution to consumer participation. To the extent that it could do things better, constructive comment is welcome. To the extent that ACIF is indeed taking steps to do things better, that should be acknowledged. The omission to do so allows a negative perception of ACIF to be drawn.

Recommendation 40: neither this recommendation, relating to consumer representation on the ACIF Board and Reference Panels, nor any part of the Framework Document outline the actual and, extensive opportunity for, consumer involvement in ACIF:

- On the ACIF Board, there are currently 3 Directors representing consumer/end-user organizations – CTN, Setel and ATUG.

⁷ Framework Document, p 41

- Reference Panels: currently have consumer/end-user representatives who are members of ACIF (membership of ACIF is a requirement for membership of Reference Panels)
- Working Committees: membership of ACIF is not a requirement for participation in Working Committees. ACIF advertises the creation of new Working Committees in order to attract representatives from the widest constituencies.
- In addition, ACIF has 2 separate advisory bodies – the CAC and Disability Advisory Body.

Recommendation 41: neither this recommendation, nor the Framework Document, acknowledge the funding which ACIF provides for its consumer representatives. In 2004, the cost to ACIF to fund consumer participation was \$120,000. This does not include the costs of administrative support provided by ACIF to its consumer representatives.

Recommendations 52,53, 57, 58: these recommendations do not acknowledge the initiatives which ACIF has put in place to address Code compliance issues. ACIF's commitment to driving compliance has been publicly stated on numerous occasions since April 2004. In particular, ACIF has appointed a Compliance Manager with the specific brief of driving compliance and reviewing the Code Administration and Compliance Scheme. Given the overall context of the positioning of ACIF in these public documents, a full and complete record would require that positive initiatives such as this are acknowledged. Constructive Comment on how we could enhance it are always welcome.

Framework Document

Pages 32 and 41: The Framework Document refers to 'process and outcome failures' of ACIF and makes statements such as 'ACIF has, in the view of many consumer representatives, failed to deliver improved consumer outcomes and is regarded as a failed experiment' and 'The ACIF code regime has been a wholly inadequate vehicle for responding to marketplace failures.'

ACIF welcomes input as to how it can do things better to achieve competitive outcomes for consumer benefit. Therefore, in 2004 ACIF engaged independent consultants to review its processes and recommend how they might be improved to deliver better outcomes. This review was a matter of public record and many of those involved in the production of the CDC report were interviewed for their input. The recommendations are being worked through, in collaboration with the ACIF Consumer Advisory Council.

Failure to omit reference to ACIF's review and the work to improve its processes creates an incomplete public record.

It is also worth noting that the ACIF Strategic Plan 2004-2007, which is a public document, includes the requirement to 'Achieve and maintain appropriate and cost-effective consumer input into ACIF processes and activities'.

Statements relating to the failure of ACIF's outcomes are difficult to respond to in the absence of more factual detail. Whilst the Framework Document and the Final Report make such references as 'the current miscellaneous collection of standalone codes'⁸, it is not clear where the outcome failure lies:

- Is it the substance of the codes?: it is unarguable that since 1997, and ACIF's work, there are in place considerable consumer protections in the provision of telecommunications services which were not previously in existence, protections which consumers participated in developing. If the substance of these codes is not adequate, this needs to be detailed.
- Is it the format of the codes?: the code framework has developed as a suite of codes, rather than a single Code. ACIF understands that there have been calls – which are repeated in the Final Report and Framework Document - for a single consumer protection code or Standard. ACIF's Strategic Plan 2004-2007 specifically includes the direction to 'explore the concept of a united/single consumer Industry Code'. Further, to assist in understanding the content of its consumer Codes, ACIF is re-publishing a document which summarises the

⁸ Final Report, recommendation 13

requirements of the Codes. If this is the outcome failure pointed to, a complete public record requires these initiatives to be included.

- Is it compliance with Codes?: As already discussed, ACIF is taking initiatives in this regard. If this is the outcome failure, then again a complete public record requires these initiatives to be included.
- Is it enforcement of registered Codes?: enforcement of registered Codes is a legislative function of the ACA. It should be clear for the public record that if it is enforcement issues contributing to statements of 'outcome failure', these are not issues within ACIF's purview.

Page 33: the background offered on the 'contracts issue', on p 33 and footnote 32, stops at a point in time before the development of the Consumer Contracts Code and does not acknowledge the initiatives put in place by ACIF to develop and expedite that Code. A full and complete history should contain the steps actually put in place to develop the Code and recognize that as at the time of release of the CDC documents the Working Committee had largely completed its work and publication of the Code was expected in February 2005.

17 January 2005

27 October 2008

Mr Bill Davidson

Acting Chief Executive Officer

Choice

57 Carrington Road

MARRICKVILLE NSW 2204

Dear Bill,

I have written to you separately about opportunities for collaboration to enhance outcomes for consumers in the broadband-enabled world. The research I referred to in that letter provides a constructive and positive commentary on important consumer issues. It is my view that better outcomes are achieved through constructive, positive and collaborative engagement of stakeholders.

That said, however, I feel I must put on the record a formal response to the Choice report – ‘Consumer Protection in the Communications Industry: Moving to best practice’. In the interests of moving towards a more collaborative partnership of stakeholders, I make only a few observations about some of the inaccuracies in the submission.

The document makes the claim that the current framework under the *Telecommunications Act 1997* (‘the Act’) for industry codes of practice dealing with consumer protection issues is flawed and that ‘a new model should be created’. It is significant that the document is focussed on ‘process’ issues. I could not find references to how the industry codes of practice are ‘substantively’ deficient – that is, that there are gaps or deficiencies in the substantive consumer protections that have been developed. Further, the submission concludes that ‘[t]he new model...will deliver a comprehensive package of consumer protections that can deliver consumer confidence in telecommunications products and services’ without identifying where gaps currently exist in the current consumer protection regime and what new protections are necessary.

Of major concern is that the submission does not convey a full understanding and appreciation of the provisions and operation of the Act, the role of the TIO, and the role of ACMA.

- (i) The criteria for registration of an industry code by ACMA are not 'largely procedural' (section 4.2 and 4.3). The overriding test for registration is that ACMA must be satisfied that 'the code provides appropriate community safeguards for the matters covered by the code.' (section 117(1)(d)). This is very much related to the substance of the code provisions, and there are other provisions of s 117 which relate to procedural issues such as consultation with relevant stakeholders.
- (ii) The exact status of a registered code is quite clear (section 4.2). Once the code is registered, it must be complied with by service providers. Failure to do so can result in enforcement action by ACMA - a direction to comply under s 121 of the Act, a formal warning under s 122, and/or proceedings in the Federal Court for pecuniary penalties.
- (iii) It is the legislative provision for registration of industry codes and enforcement of industry codes by the regulator which sets the telecommunications industry scheme apart from some of the other industry schemes referred to in the submission. Unlike other sectors (such as banking) where sign-up to a voluntary code is required in order for the signatory to be held contractually bound by its provisions, no sign-up is required in respect of a Part 6 registered Code in order for it to be enforceable by ACMA against a service provider. Once a code is registered, it is enforceable.
- (iv) Also significant to the Part 6 scheme is the role of the TIO. Whilst the submission acknowledges the TIO's role in dispute resolution (p 9), it does not acknowledge the role of the TIO in monitoring and reporting on compliance with industry codes. It is factually incorrect to say that there is an 'absence of regular reports and published statistics' of compliance monitoring. I refer the authors of the submission to the annual TIO Reports. See also p 68 of the 2007 Annual Report, which outlines how the TIO captures, investigates and publicly reports on possible and actual breaches of Codes. The Banking and Financial Services Ombudsman does not fulfil a similar role, and the Annual Report of the BFSO does not contain compliance reports or statistics relating to the Banking Code of Practice.
- (v) The TIO provides complaint statistics and analysis to ACMA to assist ACMA in identifying service providers that appear to be consistently breaching registered codes. Indeed, earlier this year, the TIO and ACMA publicly announced the signing of a Memorandum of Understanding to enhance their collaboration on information provision.
- (vi) The observations that minimal enforcement action has been taken by ACMA are correct (section 4.5). In light of the existing mechanisms for

compliance and enforcement under the telecommunications regime, it may have been more useful for the report to focus on utilisation of the existing mechanisms rather than recommending the creation of other processes based on compliance mechanisms of industries which do not have the benefit of legislative enforcement mechanisms.

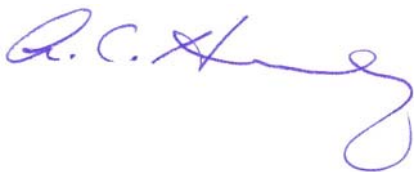
- (vii) The observations on the development of codes for the 'Internet sector' are interesting. At the very least, the 'internet sector' is not separate from the telecommunications sector –all ISPs are carriage service providers and subject to Part 6 Codes – and as a point of comparison it is questionable. A major point of comparison, however, is that Codes developed by Communications Alliance under Part 6 of the Act are developed by a Working Group consisting of both suppliers and consumer representatives. Codes developed by the IIA under the Broadcasting Services Act 1992 rely on the public comment phase of code development for consumer consultation. It would have been helpful, therefore, to understand how 'some problems [which] have been identified regarding the consultation process for codes and a perceived lack of transparency regarding monitoring and enforcement mechanisms' do not impact the conclusion that 'aspects of co-regulation appear to be working well in the Internet sector'.
- (viii) A final point of correction is that the Telecommunications Consumer Protection Code ('TCP Code') has actually been registered by ACMA. This will also impact the table in Appendix 1 which contains outdated references to the ACIF Codes now replaced by the TCP Code.

I make these comments for the record, and will be sharing them also with the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy.

I acknowledge that there may be merit in reviewing process issues relating to how industry codes of practice are developed and enforced. Communications Alliance will engage in any review – formal or informal – in a collaborative and informed way.

I look forward to working collaboratively with you and Choice on substantive initiatives to enhance outcomes for consumers in the broadband-enabled world.

Yours sincerely,



Anne Hurley
Chief Executive Officer



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