

COMMUNICATIONS
ALLIANCE LTD



Standing Committee of Officials of Consumer Affairs

'An Australian Consumer Law: Fair Markets –
Confident consumers' (February 2009)

Submission by Communications Alliance

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'An Australian Consumer Law: Fair markets – Confident consumers'

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1 Introduction

Communications Alliance welcomes the initiative to rationalise and harmonise consumer protection laws in the proposed *Australian Consumer Law* based on the existing consumer protection provisions of the *Trade Practices Act 1974 (TPA)*.

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.

Members of Communications Alliance will be making individual submissions and this submission is made as an additional and complementary submission of the industry. We also note that there will be opportunity for further comment as draft legislation is released.

This submission does not address the specific features of the *Australian Consumer Law* as outlined in the paper. Rather, it goes 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*¹ as well as the telecommunications industry-specific framework for consumer protection under the *Telecommunications Act 1997 (Telco Act)*.

For the avoidance of doubt, the common views represented in this submission relate only to the telecommunications industry-specific laws relating to consumer protection. This submission does not deal with or apply to the telecommunications industry-specific laws relating to competition and access regulation. The common view on the merits of moving to a general basis for consumer law should not be read to imply any position on (the removal or otherwise of) other areas of telecommunications-specific regulation - competition and access regulation.

¹ It is also subject to the generic State and Territory consumer protection laws with which the harmonization initiative is concerned.

2 Executive Summary

Communications Alliance welcomes the initiative to harmonise and rationalise generic consumer protection laws in the proposed *Australian Consumer Law*.

It is the objective that the *Australian Consumer Law* should apply to all consumer transactions, and consumer transactions for telecommunications services will continue to be covered by its provisions as they are by the existing provisions of Part V of the *TPA*.

In addition to the consumer regulation under the *TPA* which is administered by the ACCC, the telecommunications industry is also subject to an industry-specific consumer protection regime under the *Telco Act*. This regime is administered by the Australian Communications and Media Authority (ACMA).

The establishment of the industry-specific consumer protection regime was a response in time to the introduction of open competition in the telecommunications industry in 1997. Twelve years on, and the policy drivers for the creation of the additional industry-specific regime no longer exist.

Communications Alliance submits that the telecommunications industry should obtain the full benefits of the rationalisation and harmonisation of consumer protection laws under the auspices of the *Australian Consumer Law*.

The telecommunications industry should not continue to be regulated under an industry-specific consumer protection framework, in addition to generic consumer protection laws. It should not be subject to duplicated requirements and consequently higher compliance costs than other industries. Duplication translates to higher compliance costs for businesses and these are inevitably passed on to consumers in the form of higher prices. If duplication is eliminated, consumers would not have to continue to wear these costs. As for other industries, there should only be 1 regulator for consumer protection issues in the provision of telecommunications services.

Telecommunications services will be regulated under the enhanced regime of the *Australian Consumer Law* which is underpinned by clear objectives on the operation and application of those laws.

As part of this initiative to harmonise and rationalise the consumer policy framework, it is submitted that there should be consequent amendments made to the *Telco Act* and the *ACMA Act* to remove the industry-specific role and functions of the ACMA.

3 Industry-specific consumer protection framework under the Telco Act

The *Telco Act* was the legislative instrument by which open competition in telecommunications was introduced. To facilitate the industry evolving from the monopolistic provision of phone services to the competitive provision and to provide confidence to consumers, the Government introduced industry-specific regulation in respect of both competition regulation and consumer protection regulation, including:

- The *Telecommunications (Consumer Protection and Service Standards) Act 1997 (Telco (CPSS) Act)* brought in legislated consumer protections including the Universal Service Regime, the Customer Service Guarantee and the Telecommunications Industry Ombudsman scheme;
- Part 6 of the *Telco Act* created the framework for the development of industry codes of practice relating to consumer-related issues.
- Section 6 of the *Australian Communications Authority Act 1997 ('ACA Act)* included in the telecommunications functions of the ACA the role of reporting to and advising the Minister 'in relation to matters affecting consumers, or proposed consumers, of carriage services, as well as other functions relating to the provision of information to consumers;
- Section 52 of the *ACA Act* required the ACA to establish an advisory committee – the Consumer Consultative forum – to assist it 'in performing its functions in relation to matters affecting consumers.'
- Part XIB of the *TPA* brought in the provisions for anti-competitive conduct and record-keeping rules in the telecommunications industry;
- Part XIC of the *TPA* created the telecommunications-specific access regime.

The telecommunications industry was not exempted from the operation of Part V of the TPA because of the introduction of an industry-specific consumer protection framework. Consumer transactions in telecommunications were, and are, regulated under both regimes.²

However, the provisions of Part IVB of the *TPA* which relate to the development of industry codes under the *TPA* are not open to the telecommunications industry – all codes of practice must be developed under Part 6 of the TPA:

http://www.treasury.gov.au/documents/1126/HTML/docshell.asp?URL=03_propose.asp.

² By contrast, the financial services industry has been specifically exempted from the operations of the TPA – s 51AF.

4 Application of the Telco Act consumer-protection framework

The overarching fundamental regulatory objective of the *Telco Act* is that '*telecommunications be regulated in a manner that:*

- (a) promotes the greatest practicable use of industry self-regulation; and*
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry...'*

Notwithstanding the reference to 'industry self-regulation', under Part 6 of the *Telco Act* a co-regulatory framework is established for the telecommunications industry. Industry Codes of Practice may be made by an industry body. ³When a Code of Practice is registered by the ACMA upon satisfaction that certain process/consultation criteria have been met in the development of the code, and that 'the code provides appropriate community safeguards for the matters covered by the code' ⁴, the code becomes a mandatory code capable of enforcement by the ACMA.

The ACMA's enforcement powers are:

- A direction to comply with a code ⁵
- A formal warning of a contravention of a code ⁶
- An application to the Federal Court for a pecuniary penalty of up to \$250,000 ⁷

Section 113 of the *Telco Act* sets out examples of some of the matters that may be dealt with by industry codes of practice, many of these relating to customer transactions – for example, telling customers about:

- (i) goods or services on offer; and
- (ii) the prices of those goods and services; and
- (iii) the other terms and conditions on which those goods or services are offered.⁸

Part 6 of the *Telco Act* invests the ACMA with the power to register industry codes of practice upon satisfaction of the 'appropriate community safeguards' test.

There is no legislative guidance on the criteria to be applied in determining 'appropriate community safeguards'.

Nor are there any legislative objectives for the application and implementation of the consumer protection framework built into Part 6 of the *Telco Act*.

This is in marked contrast to the consumer protection framework under Part V of the *TPA*, which is currently grounded in the objective set out in section 2 and which will be

³ The co-regulatory framework applies in respect of the development of technical standards and industry codes of practice which relate to technical, network and operational issues. This submission relates only to the framework as it applies to consumer-related codes and activities.

⁴ *Telco Act* s 117(1)(d)(i)

⁵ *Telco Act* s 121

⁶ *Telco Act* s 122

⁷ *Telco Act* s 570

⁸ *Telco Act* s 113(3)(a)

enhanced by adoption in the Australian Consumer Law of a new policy objective for consumer issues – one which includes specific references to consumer empowerment and confidence.

Section 8 of the *Australian Communications and Media Authority Act 2005* carried over the functions of the ACA and provides that the functions of the ACMA include:

- to regulate telecommunications in accordance with the *Telecommunications Act 1997* and the *Telecommunications Act (Consumer Protection and Service Standards) Act 1999 (Telco(CPSS) Act)*
- to report to and advise the Minister in relation to matters affecting consumers, or proposed consumers, of carriage services
- to make available to the public information about matters relating to the telecommunications industry
- to do anything incidental to or conducive to the performance of any of its functions.

The mandatory requirement for establishment of a Consumer Consultative Forum was also carried over, with the function of that Forum expressed to be '*to perform the ACMA's functions in relation to matters affecting consumers*'.⁹

ACMA defines its responsibilities as including the promotion 'self-regulation and competition in the communications industry, while **protecting consumers** and other users. (emphasis added)'¹⁰

There is no legislative guidance on the objectives of the ACMA role regarding consumer protection or how the framework sits with the objectives of the *TPA* and the responsibilities of the ACCC.

Since 1997, a large suite of consumer-related codes of practice have been developed by the industry and registered by the ACMA. The majority of the obligations on providers in respect of consumer transactions under part 6 are now contained in *the Telecommunications Consumer Protection Code (TCP Code)*, which has individual chapters dealing with prices, terms and conditions; customer transfer; customer (unfair) contracts; complaint handling; credit management; and billing. The TCP Code and accompanying Guideline are available at <http://www.commsalliance.com.au/documents/codes/C628>

Therefore, since 1997 the telecommunications industry has been required to be compliant with the generic *TPA* consumer-protection provisions, relevant State and Territory applicable laws, as well as industry-specific consumer protection requirements under the *Telco Act* and *Telco(CPSS)Act* and mandatory registered industry codes under the *TA*.

⁹ ACMA Act s 59

¹⁰ http://www.acma.gov.au/WEB/STANDARD/pc=ACMA_ROLE_OVIEW

5 Submission

Communications Alliance submits that this opportunity should be taken to ensure that the telecommunications industry obtains the full benefits of the rationalisation and harmonisation of consumer protection laws under the auspices of the Australian Consumer Law.

The telecommunications industry should not continue to be regulated under an industry-specific consumer protection framework, in addition to generic consumer protection laws. It should not be subject to duplicated requirements and consequently higher compliance costs than other industries. Duplication translates to higher compliance costs for businesses and these are inevitably passed on to consumers in the form of higher prices. If duplication is eliminated, consumers would not have to continue to wear these costs. As for other industries, there should only be 1 regulator for consumer protection issues in the provision of telecommunications services.

The telecommunications-specific consumer-protection framework in the *Telco Act* and the functions conferred on the ACMA were a response in time to the development of a competitive industry and a desire to provide additional confidence for consumers in the evolution of a competitive market. Twelve years on, and those foundation requirements no longer exist.

Telecommunications services will be regulated under the enhanced regime of the Australian Consumer Law which is underpinned by clear objectives on the operation and application of those laws. There should be consequent amendments made to the *Telco Act* and the *ACMA Act* to remove the industry-specific role and functions of the ACMA.



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