



Australian
Competition &
Consumer
Commission

*Communications Alliance review of C628:2011 Telecommunications
Consumer Protection Code*

Australian Competition and Consumer Commission submission

30 November 2011

Overview

The ACCC has welcomed the opportunity to participate in Communications Alliance's review (Review) of the Telecommunications Consumer Protection (TCP) Code as a member of the Review steering group.

Through the Review, the ACCC has observed the significant efforts made by Industry to improve the TCP Code for the benefit of consumers.

However, the Review has ultimately demonstrated that even with Industry good will, it is extremely difficult for a large and diverse sector to agree to submit itself to a common set of robust consumer protection measures that its members may perceive as conflicting with their own business interests.

The ACCC has reviewed the draft revised TCP Code and has noted a number of concerns about its ability to provide the enhanced protection for consumers that is needed in this sector. These concerns relate to the effectiveness of the proposed industry compliance framework and the substance of the proposed Code rules.

Incentives for compliance

A significant concern for the ACCC is the ability of the TCP Code's compliance framework to deter poor conduct and provide incentives for the telecommunications industry to adopt a culture of compliance.

The ACCC has stated that, even with industry taking more responsibility for members' Code compliance, the sanctions available to the Australian Communications and Media Authority (ACMA) to enforce Code breaches are unlikely to be sufficiently strong to deter misconduct.¹

The Code's compliance framework (the proposed *Communications Compliance* or CC model) would need to introduce significant commercial and reputational consequences for providers that breach Code rules to persuade the ACCC that it could effectively supplement the limited compliance incentives that exist under the co-regulatory legislative framework.

Characteristics of a strong compliance framework would include that it: applies to all industry members; is aimed at quickly detecting and remedying non-compliant conduct; is transparent; and incorporates commercially significant sanctions for non-compliance that act as a strong incentive for businesses to comply.

The ACCC notes that sanctions that exist in other self- and co-regulatory regimes include: public naming of non-complying organisations; withdrawal of offending advertising; requirements for corrective advertising; and requirements for compliance audits.

The Telecommunication Industry Ombudsman's (TIO) recent annual report highlights how, in the context of the Mobile Premium Services sector, the introduction of serious commercial consequences (including termination of a supplier's ability to operate) has contributed to a major decline in complaints about MPS services².

Through the Review, the telecommunications industry has had the opportunity to create a strong framework. The ACCC notes that the proposed CC model proposes a range of compliance obligations. However, the ACCC has concerns about several aspects of the proposed framework. These include:

¹ ACCC submission to the ACMA's *Reconnecting the Customer* Inquiry draft report, 4 August 2011

² The TIO 2011 annual report shows that MPS complaints fell by 45 per cent over 2010-11, p9

1. Naming non-compliant providers

Under the CC model, providers will only be listed on CC's website if they have not provided one of the annual compliance statements, Compliance Achievement Plan or Action plans. It is not proposed to include details of specific breaches.

This information is not likely to be meaningful to consumers who are seeking to assess a providers' level of compliance and is therefore unlikely to be perceived as a significant reputational risk to some providers.

The ACCC considers that for the framework to be effective and to have the appropriate deterrent effect, it would need to name providers in a prominent manner that made clear the nature of the non-compliance and provide details of any remedial action.

2. Discretion in relation to ACMA referrals and other processes

Code enforcement responsibilities will continue to reside with the ACMA and the CC's ultimate enforcement option is to refer providers to the ACMA for further investigation.

The proposed model gives the CC a high degree of discretion as to the circumstances in which it refers non-compliant providers to the ACMA.

Notwithstanding that guidelines for referral may be eventually be developed as part of the CC's constitution or through an MOU with the ACMA, this discretion creates significant uncertainty about how the CC will address instances of non-compliance.

This uncertainty extends to the circumstances in which the CC may:

- a. require a provider to undertake certain processes (such as a Compliance Achievement Plan or Action Plan);
- b. determine that these processes are not progressing satisfactorily, and;
- c. determine when an investigation is necessary; the processes that an investigation would entail; and the circumstances in which the CC would determine the outcome of the investigation was unsatisfactory.

For this framework to be effective it would need to set out clear and transparent criteria for the types of breaches that would trigger particular responses. The ACCC considers that this level of clarity and transparency about processes is necessary to give consumers confidence that industry participants will incur a sanction for code breaches.

3. Compliance monitoring

The ACCC has concerns with the proposed annual self-reporting model.

Self-monitoring is unlikely to give an accurate picture of industry compliance in its own right nor be effective in quickly identifying emerging issues. Some Code breaches, particularly relating to point-of-sale advice and customer service are unlikely to be detected.

The proposed framework does not incorporate proactive compliance monitoring measures that would verify that processes and policies are being followed. This is a necessary component in any effective regime monitor industry compliance.

The 12-month interval between reports may allow poor practices that cause consumer harm to remain undetected for extended periods.

The ACCC notes that the CC will receive information from the TIO and may be able to receive compliance information from other sources (if the CC allows for this in its constitution). However, it is unclear how CC may use this information to address non-

compliance. In any event, these additional information sources do not reduce the ACCC's other concerns about the overall effectiveness of the CC's monitoring arrangements.

In summary, while the proposed compliance framework may increase industry awareness of the Code, it does not introduce the significant incentives necessary to change industry attitudes to compliance and supplement the limited compliance incentives of the telecommunications co-regulatory framework.

The ACMA's *Reconnecting the Customer* public Inquiry recommendations

The ACMA's *Reconnecting the Customer* (RTC) Inquiry Final report provided detailed insights into the wide range of issues that have caused consumer complaints to the Telecommunications Industry Ombudsman (TIO) to increase dramatically in recent years.

The RTC Inquiry final report provides a strong evidentiary base to support its conclusions and recommendations. It is highly persuasive in its recommendations for major changes to the way telecommunications consumer protection is regulated.

The ACCC considers that the RTC Inquiry's recommendations in relation to advertising and pricing, information disclosure, expenditure management and data usage tools, and complaints handling are critical consumer protection measures..

It is therefore disappointing to note that industry has not taken the opportunity to fully adopt the RTC Inquiry recommendations. The ACCC notes, for instance:

- *Spend management tools* – Proposed Code rules would only apply to residential customers on post-paid included value plans and only to the data component of their plans. Providers would be allowed to charge consumers for these.
- *Critical Information Summary* – As proposed in the revised draft Code, the critical information summary does not require providers to include a range of important information, including the TIO and internal dispute resolution contact details.
- *Display of pricing information* – There is no requirement to display volume-based pricing. The Code's proposed pricing information rules do not require the information to be displayed in all advertising.
- *Complaints handling* – The proposed Code rules do not address the RTC Inquiry's recommendations to establish benchmark standards for complaints handling.

Again, the qualified way in which these issues have been addressed demonstrates the difficulty in securing industry agreement to strong consumer protections.

Given the critical importance of the RTC recommendations in protecting consumers from detriment, strong incentives are needed to signal to industry that compliance with these provisions is not optional. The potential for direct ACMA enforcement action and significant financial penalties is needed to provide such incentives.

For this reason, the ACCC does not support these issues being included in the Code, but supports the ACMA developing regulation such as Industry Standards that will directly address them.

Code issues outside the RTC Inquiry scope

The ACCC has a range of comments in relation to Code issues that were outside the scope of the RTC Inquiry.

- *Language and enforceability* – A critical deficiency with the current TCP Code is its use of unspecific language that does not create a clear compliance obligation and may make it difficult to establish a breach has occurred. The ACCC notes that the revised draft Code

retains several instances of such language – for example: ‘*appropriate training*’ [6.12.1(e)]; ‘*easy access*’ [6.12.1(f)]; and ‘*as soon as practicable*’ [8.2.1(a)(ix)].

The ACCC also notes that parts of the revised draft Code retain a deficiency of the current TCP Code of requiring providers to have certain processes in place, but not a requirement to comply with those processes. For example, 8.1.1(a)(vii) requires providers only to have certain things ‘set out’ in complaints-handling policy.

- ‘*Offer*’ and ‘*included value*’ – The narrow definitions given to these terms limits the application of some Code provisions and reduces their usefulness as consumer protections.
- *Credit & Debt* – The ACCC has a key interest in ensuring that disadvantaged and vulnerable consumers receive strong protections under the telecommunications consumer protection framework. The proposed Code rules relating to consumer access to hardship policies do not require providers to give consumers a copy of their policy when they indicate that they are experiencing hardship.

This appears to reduce the protections available under the current TCP Code.

The ACCC’s view is that with significant improvements, these provisions could have offered an adequate community safeguards, provided they were supported by a strong Code compliance framework.

For reasons outlined earlier in this submission, the ACCC does not consider this to be the case. Accordingly, the ACCC supports the ACMA directly regulating these issues through Industry Standards.

Conclusion

For the reasons noted this submission, the ACCC is not persuaded that the draft revised TCP Code is capable of delivering the strong protections that would provide adequate community safeguards to consumers of Australian telecommunications services.

In contrast, the ACCC anticipates that Industry Standards, with their direct compliance obligation and associated significant financial sanctions, will provide the necessary motivation for providers to follow the relevant rules and processes and ultimately improve outcomes for consumers.

