

25 November 2011

C/- Christiane Gillespie-Jones
Communications Alliance Ltd
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MILSONS POINT NSW 1565

BY EMAIL: c.gillespie-jones@commsalliance.com.au

Dear Ms Gillespie-Jones

Re: Public Submission: Draft Telecommunications Consumer Protections Code

M2 Telecommunications Group Ltd ("M2") is pleased to provide its submission in respect of the draft Telecommunications Consumer Protections Code (DR C628:2011).

The submissions, as set out in Annexure A, are made on behalf of the M2 group of companies, including:

- (a) People Telecommunications Pty Ltd;
- (b) M2 Commander Pty Ltd;
- (c) Southern Cross Telco Pty Ltd;
- (d) M2 Telecommunications Pty Ltd; and
- (e) M2 Clear Pty Ltd.

If the Working Committee has any queries or comments in respect of M2's submission, please do not hesitate to contact us.

Yours sincerely,



Kellie Dean
Company Secretary & Legal Affairs
M2 Telecommunications Group Ltd

ANNEXURE A

Telecommunications Consumer Protections Code (DR C628:2011)
Submission on behalf of M2 Telecommunications Group Ltd

**Sale of Supplier's Business or Supplier Reorganisation
(Code Reference: clause 7.11.1(a)(vii) and clause 7.11.1(b))**

This provision requires that a Supplier provide a Customer with, *inter alia*, a right to terminate the Contract relating to the Telecommunications Service within 30 Working Days of the Supplier's notice to the Customer in the event of a sale of the Supplier's business or a Corporate Reorganisation ("**Walkaway Right**").

In the case of a sale of a Supplier's business, M2 is concerned that the operation of these clauses are likely to have material and unjust consequences on Suppliers, in particular, Carriage Service Providers who own limited or no network infrastructure ("**Affected CSPs**").

As at the date of drafting this submission, M2 anticipates that the number of Affected CSPs is approximately 955.¹

M2 submits that in respect of the Affected CSPs, in absence of material network infrastructure, the most significant asset typically owned by an Affected CSP is contractual rights under Customer Contracts ("**Customer Base**"). Much like all Suppliers, extensive amounts are typically invested by an Affected CSP in procuring, maintaining and growing its Customer Base.

The ability for a Supplier (Affected CSPs or otherwise) to assign or novate its Customer Base to a Gaining Supplier in the context of a sale is integral to the ability of a Supplier obtain initial and ongoing finance and to realize the value of its investment into its Customer Base.

Accordingly, M2 submits that the introduction of clauses 7.11.1(a)(vii) and 7.11.1(b) in their present form are unjust as those clauses have the potential to reduce the value of a Supplier's Customer Base (potentially to nil) by creating material illiquidity of a Customer Base by way of a restraint on alienation.

In effect, in circumstances where a Customer Base can effectively 'walkaway' upon notice of a transfer, means that a Supplier not only has no asset to sell, but also no longer has any asset to retain for itself should the sale not eventuate.

Furthermore, M2 is concerned that the relevant clauses may have an adverse effect on financing options and the promotion of competition in the marketplace for telecommunications goods and services. M2 anticipates that an environment in which a Supplier's Customer Base is largely illiquid and potentially of limited to no value may:

¹ Calculated as follows: 1,162 (Carriers and Carriage Service Providers subscribed to the TIO scheme) less 259 (Carriers and Nominated Carriers registered with the ACMA) = 903 (Carriage Service Providers): see http://www.tio.com.au/__data/assets/pdf_file/0003/28470/TIO_2010-11_AR.pdf at p.3 and http://www.acma.gov.au/WEB/STANDARD/pc=PC_1625

- (a) discourage new entrants into the relevant marketplace in the short to long term;
- (b) encourage existing Suppliers to realize their investment into their Customer Base in the short term (and in any event, prior to the registration of the Code);
- (c) discourage existing Suppliers from significant investment into procuring, maintaining and growing their Customer Base, thereby reducing product and service innovation in the relevant market place;
- (d) affect the ability of Suppliers to obtain third party finance to develop, grow and operate their operations; and
- (e) place Suppliers in breach of financial covenants with their third party financiers, particularly financial covenants which are contingent upon the valuation of the Supplier's assets.

In the case of a Corporate Reorganisation whereby Customers may seek to cancel their Contract as a result, M2 considers that this is simply impractical and will hinder valid and legal corporate reorganisational strategies. Put plainly, Suppliers are entitled to have flexibility in relation to their corporate structural needs and objectives, without having the potential impact of reducing the value of their assets.

M2's Position:

M2 appreciates that the intention of the clauses may be to provide a Customer with security in respect of the identity of its Supplier. In particular, M2 notes that consumer advocacy groups have raised concerns relating to coverage or customer service issues affecting a Gaining Supplier's service.

M2 also notes the concerns of consumer advocacy groups that adopting a process that places the burden on a Customer to demonstrate more than a minor detrimental effect upon transfer has been considered to place an unreasonable onus of proof on a Customer.

However, M2 submits that Customers will have adequate protection under the Code (and otherwise at law) if the protections under the 2007 version of the Code ("**Current Code**"), specifically clause 5.1 (Unfair Terms) are maintained but adopted but with a 'reverse onus' variation to avoid an argued unreasonable burden on Customers.

By way of background, under the Current Code, M2 considers that if a Consumer is affected by a transfer to a Gaining Supplier (which may include as a result of a sale of business or Corporate Reorganisation) and that transfer has more than a minor detrimental impact on the Consumer, clause 5.1 of the Current Code indicates that it will be unfair if the Consumer is not provided with at least 21 days Written Notice and the right to terminate the Consumer Contract within 42 days of the date of the notice (current Consumer onus of proof is noted).

M2 would anticipate that in circumstances where the identity of the Supplier is integral to the Consumer (for example, for coverage or customer service reasons), a common sense application of clause 5.1 will render it unfair for a Supplier to prevent a Consumer from terminating its Consumer Contract. This is particularly the case as there is no basis to read clause 5.1 as being limited to circumstances of a 'detrimental impact' that is financial in character.

Annexure A

Moreover, M2 considers that in respect of the specific concerns of coverage and customer service, safeguards exist contemporaneously at law. For example, the ACCC has indicated that the supply of a mobile service in areas of poor or no mobile coverage are likely to contravene section 36 *Australian Consumer Law* (Wrongly Accepting Payment) and the TIO has demonstrated that it expects a Supplier to release a Customer from their Customer Contract in circumstances of questionable coverage to achieve a fair outcome. Further, in respect of customer service concerns, the Code contains exhaustive provisions in relation to customer service obligations and those obligations are enforceable by Communications Compliance and ultimately, the ACMA.

As a result of the foregoing, it is M2's position that an appropriate balance will be struck between, on the one hand, protecting a Customer's choice of Supplier and on the other hand, protecting a Supplier's valuable Customer Base and promoting competition in the relevant marketplace, if the Code was amended to:

- (a) remove categorical and absolute Walkaway Rights;
- (b) confirm that a Supplier must provide a Consumer with Walkaway Rights if the Consumer, within 42 days of receiving notice of the proposed transfer, notifies the Supplier that it considers that the transfer is likely to have more than a minor detrimental impact on the Consumer and the Supplier is unable to demonstrate to the Consumer's reasonable satisfaction (within a predetermined period of time) that the transfer is unlikely to have more than a minor detrimental impact (note the reverse onus of proof); and
- (c) confirms that a Consumer will not incur any charges from the Supplier if the Consumer decides to 'walkaway', other than:
 - (i) usage or network access charges to the date that the Customer Contract ends; and
 - (ii) outstanding amounts for installation costs or for equipment compatible with other Suppliers' services.