

25 November 2011

Fay Holthuyzen
Chair
Telecommunications Consumer Protections Code Revision Steering Committee
Communications Alliance
PO Box 444
Milsons Point NSW 1565

Dear Ms Holthuyzen

Telecommunications Consumer Protection Code—Draft for Public Comment (DR C628:2011)

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the draft revised Telecommunications Consumer Protection Code (**draft Code**).

For registration of an industry code under the *Telecommunications Act 1997* (Cth), the Australian Communications and Media Authority (ACMA) must be satisfied that it provides "appropriate community safeguards".¹ We believe that the draft Code does not appropriate community safeguards and significant revision is required for it do so—we do not believe it should be approved by ACMA in its current form. The draft Code is lengthy and we would like to limit our comments to the following areas to demonstrate our concerns:

- the overall complexity and lack of clarity of the draft Code requirements;
- inadequate financial hardship provisions; and
- concerns with the draft Code's compliance and monitoring framework.

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.

¹ Section 117(1)(d)(i), *Telecommunications Act 1997* (Cth)

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 experiencing financial difficulty.

Complexity and lack of clarity in draft Code

We have a number of broad concerns with the complex nature of the draft Code which make it very difficult for consumers to understand the rights and protections afforded to them.

It is notable that the draft Code, running to 98 pages, is significantly longer than comparable documents—for example the Victorian Retail Energy Code runs to 48 pages including defined terms, and the Code of Banking Practice is only 26 pages.

While we recognise that the Code is an industry document, it is not unreasonable to expect that individual consumers may seek to read it in order to understand what suppliers' obligations to them are, particularly in order to effectively frame any complaint they might have. The sheer number of defined terms—113 in total—is a significant barrier to the draft Code being user-friendly, particularly for consumers.

We believe an industry code which provides appropriate community safeguards should be drafted so as to be readable and understood by average consumers. Good industry codes, including the Code of Banking Practice and the Mutual Banking Code of Practice, are drafted in the second person (i.e. "we will be fair and ethical in our dealings with you"). The draft Code is drafted in technical language and does not meet a good practice standard in this regard.

Further, many clauses in the draft Code are unclear or ambiguous. For example, clause 4.1.5 "Remedies for inaccurate information" states:

Where inaccurate information has been provided by a Supplier to a Customer regarding an Offer and the Customer has relied on it in making a purchasing decision to sign up to that Offer with the Supplier, the Supplier must offer a remedy that is appropriate in the circumstances for that Customer

It is unclear from this section what remedy a consumer would be entitled to. Our view is that for the draft Code to offer appropriate community safeguards, its should be clear and obligations on suppliers should be unambiguous.

We also believe that an industry code that provides appropriate community safeguards would provide consumer protection beyond that which is required by the law. While there are some provisions that enhance consumer protection (for example, the much needed clarification of use of the term "cap"), we are concerned that the draft Code is deficient in this regard. For example, clause 4.3.5 "Unsolicited offers" states:

A Supplier must ensure its Unsolicited Offers comply with the law. A Supplier must take the following actions to enable this outcome: (a) Compliance: comply with the laws regarding telemarketing, electronic marketing and door to door sales, including,

without limitation, the Competition and Consumer Act, the Do Not Call Register Act 2006 and the Spam Act 2003.

The clause appears to be merely a restatement of compliance obligations under existing laws, and does not provide enhanced protection with respect to unsolicited offers. That being so, it is not clear why this clause is needed at all.

Financial hardship

Both our financial counselling service and legal practice regularly receive calls from consumers with problems with telecommunications providers who have received unsatisfactory responses to requests for hardship variations. We regularly refer consumers with specific grievances directly to the Telecommunications Industry Ombudsman for resolution of their issues.

Most of our financial counselling clients do not have just one debt but multiple debts, and their telecommunications supplier is one of a number of creditors. It is not uncommon for telecommunications debts to be several thousand dollars, which suggests that credit assessment processes have not been adequate in ensuring consumers are not given access to credit that should not have been available to them.

Our counsellors have observed that in negotiating with creditors, telecommunications providers are extremely unwilling to genuinely negotiate. Critically, suppliers commonly require unreasonable payment arrangements resulting in customers being at a high risk of defaulting on the arrangement. What appears to be a lack of willingness to negotiate means the arrangement fails because of the unbalanced demands of the supplier. Current practices often do not help customers pay their debts and get back on track, and often exacerbates and extends any period of hardship they are experiencing.

Typical complaints we hear from consumers and financial counsellors include:

- staff refusing to put consumers through to financial hardship teams, even when they specifically request this;
- unwillingness of hardship teams to genuinely negotiate a payment plan that the customer can afford;
- unwillingness of suppliers to confirm agreements in writing;
- consumers with unexpectedly high bills that they dispute are not taken as a complaint when the customer calls—they are just told to pay the bill;
- unreasonable debt collection practices, including referral of small debts to debt collectors and particularly aggressive pursuit of debts by debt collectors, including unwarranted use of credit reporting;
- suppliers are unwilling to negotiate lower amounts to be repaid in order to satisfy the debt;
- time limits imposed on the Ombudsman's jurisdiction preventing consumers having a dispute investigated, which causes particularly problems when debt collectors seek to collect ageing debts.

We are concerned that chapter 6 of the draft Code is currently framed around credit and debt management, rather than financial hardship. We welcome the provisions proposing spend management tools (although we believe usage information should be available in real time to be of use). However, we are concerned about the lack of detail about the obligations of suppliers to identify and support consumers experiencing financial hardship. We believe that an industry code that meets appropriate community safeguards should include an outline of what should be expected in suppliers' hardship policies, including:

- details of when a customer is considered to be in financial hardship and thus be able to access assistance (good practice suggests that customers with an intention but not the capacity to make payment within the timeframe required by suppliers would be in financial hardship);
- details of how financial hardship is to be identified, including identification by the supplier, the customer or a customer's advocate;
- information about the processes and criteria suppliers will use in identifying customers in financial hardship;
- a commitment to fair and reasonable payment options with fair and reasonable instalment intervals that accommodate the particular circumstances of customers in financial hardship and to monitor customer's payments, including the accumulation of debt;
- a commitment to referring customers to other support services such as financial counselling services where appropriate; and
- a commitment that suppliers will consider whether customers in financial hardship are on the most appropriate contract or plan for their needs.

Other industries are significantly more sophisticated in recognising hardship and have industry code provisions focused on ensuring customers stay connected and are given genuine opportunities to negotiate repayment arrangements. We refer particularly to the energy sector which have made inroads in this area.²

Compliance and monitoring provisions

A successful code compliance framework hinges on having code rules that are unambiguous and measureable. As outlined above, many of the obligations throughout the draft Code are not sufficiently concrete. In addition to clauses noted above, clause 9.2 on promoting code awareness does not provide clear obligations as to how awareness is to be promoted—this clause could include requirements that the code is to be promoted on bills, through supplier websites and at retail outlets.

It is our view that an industry code compliance and monitoring framework that provides appropriate community safeguards should include a rigorous performance monitoring regime. This was also a recommendation of ACMA's *Reconnecting the Customer (RTC)* report.³ The draft Code requires suppliers to report that they are complying with code requirements, through self-attestations and compliance plans. However, there is no requirement to implement an objective-metrics based performance reporting framework, as recommended by the ACMA RTC

² See, for example, Essential Services Commission, *Guideline No 21—Energy retailers' financial hardship policies*, January 2011.

³ ACMA, *Reconnecting the Customer—Final public inquiry report*, June 2011, proposal 3.

report. Such a framework should include data on metrics such as the number of complaints, referrals to internal dispute resolution, referrals to external dispute resolution, outcomes of dispute resolution, and details of the common issues in dispute as well as systemic issues.

These metrics should be made public so there is community awareness of the performance of different telecommunication suppliers. In its RTC report, AMCA also proposes particularly that "repeat contacts" by a customer should be measured—this does not seem to be included within the draft Code compliance framework. Inclusion of such reporting requirements would better reflect the proposals of ACMA, and would ensure that a self-reporting framework provides meaningful information about the performance of the industry.

Further, the draft Code's compliance and reporting framework does not provide the code compliance body (Communications Compliance) with a right to undertake investigations or audits on its own motion. By comparison, own motion investigations is now the primary activity of the Code Compliance Committee of the Code of Banking Practice. Own motion investigations enable a code monitoring body to investigate compliance with particular obligations under the code through a variety of means, including "shadow shopping". This sort of activity gives the code monitoring body a good understanding with actual code compliance, rather than relying on self-attestations of subscribers alone.

The draft Code is also unclear about the status of the proposed code monitoring body, Communications Compliance. It is not clear whether it is independent or a constituent part of the industry body, Communications Alliance. It is also not clear how it is to be funded. It is difficult to determine whether such a body provides appropriate community safeguards without this information. We do note that the chair of Communications Alliance would be one of the directors of its governing board, which would appear to compromise its independence.

Other code compliance monitoring bodies are independent of industry associations. With the Banking Code of Practice, it is governed by a consumer/small business representative, a person appointed by the banks with requisite banking experience, and an independent chair with experience in governance and public administration. This is a good model that should be considered for the telecommunications code compliance and monitoring function.

Finally, we believe that an industry code that provides appropriate community safeguards would ensure its provisions form part of the contractual relationship between the customer and the code subscriber—it is not clear that this is the case with the draft Code. We note that the provisions of both the Code of Banking Practice as well as the Mutual Banking Code of Practice Codes have contractual force. This provides an added incentive for signatories to comply. For example, a code with contractual force would allow a consumer who was unhappy with a breach of the code to seek a remedy in the relevant state or territory tribunal or court against the supplier for breach of contract, providing further encouragement of industry subscribers to comply. It might also mean that consumer rights under the code would survive against any assignee of the telecommunication provider's rights, for example a purchaser of telecommunication debt. We are aware of cases where a consumer who is being pursued by a purchaser of a telecommunication debt does not have rights under the code, or rights to independent dispute resolution.

Please contact Sarah Wilson on 03 9670 5088 or at sarahw@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, reading "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Director of Policy and Campaigns

A handwritten signature in black ink, reading "S. Wilson". The signature is written in a cursive, flowing style.

Sarah Wilson
Senior Campaigner