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The following paper is a joint submission of Beagle Internet and EscapeNet, two medium sized carriage service providers located in Sydney and Adelaide respectively to the request for public comment by Communications Alliance Limited.

1. Introduction

In order to determine both the need, and later success of any amendments to the Telecommunications Consumer Protection (TCP) industry code, it is first necessary to determine what problem, issue or issues the proposed amendments are trying to address.

An articulation of the areas of remediation required is not made in the introductory statement of the draft code but drawing upon the Communications Alliance press release on 8 November 2011¹, it might be reasonably inferred that the need for a new TCP code has arisen from the rising number of complaints reported by the Telecommunications Industry Ombudsman (TIO).

As has been widely identified by both independent academic research² and numerous industry^{3 4 5} submissions and white papers, the statistics published by the TIO regarding the volumes and nature of complaints are deceptive and misleading.

¹ Communications Alliance, 2011, TIO Annual Report highlights need for revised TCP code
<<http://www.commsalliance.com.au/about-us/newsroom/2011-25>>, viewed 23 November 11

² University of Technology Sydney, 2010, Reconnecting the Customer Public Submission,
<http://www.dbcde.gov.au/__data/assets/pdf_file/0018/133902/University_of_Technology_Sydney.pdf>, viewed at 23 November 2011

³ AAPT, 2010, Reconnecting the Customer Public Submission, <http://www.acma.gov.au/webwr/_assets/main/lib311946/105_aapt-reconnecting_the_customer.pdf>, viewed 23 November 2011

⁴ Vodafone, 2010, Reconnecting the Customer Public Submission,
<http://www.acma.gov.au/webwr/_assets/main/lib311946/95_vodafone_hutchison_australia-10-09-10-reconnecting_the_customer.pdf>, viewed 23 November 2011

⁵ Beagle, 2010, Reconnecting the Customer Public Submission,
<http://www.acma.gov.au/webwr/_assets/main/lib311946/122_beagle_internet-reconnecting_the_customer.pdf>, viewed 23 November 2011

A brief summary of the already identified and well reported issues is:

- (i) The TIO counts a single, unique complaint several times in their statistical results and therefore the highly publicized complaint numbers are grossly over exaggerated and misleading;
- (ii) The “Level 1” complaint, which are the head-line six-figure numbers reported by the TIO, are contacts from consumers without validation, investigation or consideration of wrongdoing received by the TIO that are simply referred back to the telecommunications provider. As per numerous industry and academic submissions, it is therefore, inappropriate to refer to such actions by consumers as *complaints* but should rather, they should be referred to as *contacts*;
- (iii) The number of investigated complaints by the TIO has maintained a constant level of approximately 12% of total contacts for the past 16 years and further, the number of investigated complaints has closely followed the number of active services in Australia and has not increased in any material way.
- (iv) As of the last reporting period, the TIO found in favor of consumers in only 40.7% of the investigated complaints indicating that more than half of the complaints brought before and investigated by the TIO were baseless.

As such, any attempt to identify or mandate additional regulation on the basis of these statistics will result in inappropriate and flawed regulation that does not appropriately or adequately assist consumers, the industry or the market.

It is therefore imperative, that any additional or modified regulation resolve an actual, identified problem rather than problems of perception that are otherwise not already resolved through some other legal or regulatory means.

Given the renewed focus on the importance for appropriate and diligent probity of statistics and reporting as outlined in the recent Centro⁶ case before the Federal Court, all stakeholders at Communications Alliance owe the community and industry a duty of care to exercise appropriate inquiry of all reports, metrics or statistics relied upon prior to any proposed actions executed as part of this code.

Unfortunately, Communications Alliance has failed to identify problematic areas in need of remediation and therefore, without the formulation of a proper problem statement, there is no way to measure the success or failure of the new code in future years.

⁶ Australian Securities and Investment Commission v Healy [2011] FCA 717

2. TCP Code Amendments

There are a number of key amendments to the proposed TCP code which we analyze and examine as follows:

2.1 Redundant Regulation

There are a number of regulatory requirements in the scheme which are redundant, self-evident and unnecessary such as requiring that a Supplier must obey all laws or not engage in unconscionable or misleading conduct (sections 3.4.1, 3.5.1, 4.1.2 (d) (iv) of the proposed code).

Such regulation is already appropriately dealt with by numerous existing state and federal statutes such as the Australian Consumer Law and serves no purpose other than to bloat the code with redundant language and requirements which may ultimately become out of step with legislation.

Further, numerous aspects of the code related to advertising in sections 4.2 have already adequately been addressed in the common law (and supporting statute) by matters brought forward by the ACCC against TPG⁷ and Optus⁸.

2.2 Telecommunications Offers

The proposed code creates a number of new requirements regarding telecommunications offers made to consumers.

We strongly support the amendments in section 4.1.2 (a) which requires Suppliers to:

- (i) Cease using the term 'cap' where it is not otherwise associated with a 'hard cap' service; and
- (ii) Provide unit pricing for calls, data and text messages to facilitate ease of comparison between offers by consumers.

We do not however support the amendments 4.1.2 (c) which requires Suppliers to:

- (iii) Provide information in no more than two (2) A4 page as we believe that any such summary of offer should be provided on no more than a single (1) A4 page in order to be appropriately digested by any consumer.

⁷ Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2011] FCA 1254

⁸ Australian Competition and Consumer Commission v Singtel Optus Pty Ltd FCA 1177

We do not support the amendments in 4.1.4 and 4.1.5 as they are ambiguous, open-ended and insufficiently articulated to facilitate fair and accurate regulation or identify what carriers must do to comply with such regulations.

2.3 Consumer Contracts

The proposed code creates a number of new requirements regarding contracts entered into with consumers.

We strongly object to the following proposed changes to the code:

- (i) The requirement for a Supplier to keep previous versions of a standard form customer contract on their website for a 'reasonable' period without definition what a 'reasonable' period would be in section 4.5.1.1 (c);
- (ii) The prohibition of a 'termination for convenience' clause as defined in section 4.5.3.1 (c) of the proposed code. Such clauses have formed essential and common parts of contracts for hundreds of years and their explicit exclusion is to the detriment of both Consumers and Suppliers alike; and
- (iii) Prohibition of the exclusion of limitation of a Customer's right to a pro-rata refund of Charges incurred while a Telecommunications Service is suspended as defined in section 4.5.3.1 (b) of the proposed code. In almost every conceivable scenario, a Supplier will incur costs from upstream Suppliers while a Customer service is suspended and any Supplier ought to be able to reasonably recover their costs during a period of suspension. In particular, as such situations do commonly occur as a result of a breach by a Customer (e.g. non-payment of their service) of a material contract term. Such scenarios will become more prevalent on the National Broadband Network where all Suppliers will incur costs while services are suspended.

2.4 Direct Debit

The proposed code creates a number of new requirements regarding direct debit.

We strongly object to the following proposed changes to the code:

- (i) The requirement that a customer must not be direct debited less than ten (10) working days from when an invoice is raised as proposed in section 5.7.1 (c) of the proposed code. The previous code allowed the Customer to choose and agree to any variations on when a direct debit would occur and any removal of choice for Customers is a significant and backward step for consumers.

Further, placing a legal requirement for a minimum payment terms period of ten (10) working days may place undue pressure on smaller telecommunications supplier cash-flow and significantly reduce competition in the industry.

2.5 Rescinding Transfers

The proposed code creates a number of new requirements regarding service transfers.

We strongly object to the following proposed changes to the code:

- (i) The prohibition of the execution of a transfer or acceptance of a waiver of a cooling off period for a transfer as defined in section 7.10 (c) of the proposed code. The proposed amendment will introduce unreasonable and undue delay in transferring Customer services which will cause significant inconvenience to consumers.

For example, an average ADSL broadband service takes three (3) business days to transfer. If a cooling off period of ten (10) days applies to a particular service, the Customer will have to wait almost two (2) weeks instead of three (3) days under the new proposed regime.

This is a massive step backward for customer choice, freedom and convenience.

2.6 Restructure or Sale of Supplier Business

The proposed code creates a number of new requirements regarding sale or restructure of the Supplier businesses.

We strongly object to the following proposed changes to the code:

- (i) The capacity for a Customer to terminate their contract in spite of any binding terms or remaining contract period as a result of the sale or restructure of a supplier business as per section 7.11.1 (a) (vii) of the proposed code. The proposed term significantly reduces certainty in the sale or acquisition of customer assets for both the buying and selling parties within the telecommunications industry.

The requirement for any such regulation to be provided will undoubtedly result in loss and damage for buyers or sellers and careful analysis with respect to requirements arising from section 51 (xxxi) of the Constitution⁹

⁹ Commonwealth of Australia Constitution Act (1900)

ought to be carefully considered prior to inclusion of such terms in the code given its capability to deprive fair value from the buyer or seller in a transaction.

2.7 Complaint Handling

The proposed code creates a number of new requirements regarding complaint handling.

With respect to the proposed rules, we strongly believe that:

- (i) They ought not to apply for any complaints made on behalf of consumers by legal practitioners. Any consumer capable of engaging a solicitor or barrister to make a complaint on their behalf is likely of sufficient means to progress the matter in a more appropriate forum such as a court of competent jurisdiction;

With respect to the proposed code, we strongly believe that:

- (ii) If the complaints handling process is requested in hard copy, a reasonable charge to provide that hard copy ought to be recoverable by the Supplier;
- (iii) There is no utility in classifying the difference between Urgent and non-Urgent complaints as outlined in 8.1.1 (a). Legislation regarding Priority Assistance already adequately deals with Urgent faults and complaints;
- (iv) The prohibition of commencing legal proceedings while a complaint is being handled internally and for 7 working days after the outcome of the complaint has been notified as per 8.2.1 (a) (v) is completely inappropriate and unnecessary; and
- (v) The referral of a Customer to the TIO in the event the Complaint has been duly classified as frivolous or vexatious is completely inappropriate given the poor track record of the TIO in dealing with such complaints;

We note that the proposed code changes do not address vexatious or frivolous complaints made by consumers as instruments of extortion as noted in numerous industry submissions to the Reconnecting the Customer Public Enquiry¹⁰. The proposed

¹⁰ AAPT, 2010, Reconnecting the Customer Public Submission, <http://www.acma.gov.au/webwr/_assets/main/lib311946/105_aapt-reconnecting_the_customer.pdf>, viewed 23 November 2011

¹⁰ Vodafone, 2010, Reconnecting the Customer Public Submission, <http://www.acma.gov.au/webwr/_assets/main/lib311946/95_vodafone_hutchison_australia-10-09-10-reconnecting_the_customer.pdf>, viewed 23 November 2011

code does little to protect providers from such complaints and ultimately save consumers the associated costs which are ultimately passed to them.

2.8 Code Compliance

As part of section 9 of the proposed code, a new entity named Communications Compliance (CC) is to be created to monitor code compliance.

We strongly object to the creation of yet another bureaucracy to regulate the telecommunications industry given the significant and powerful investigatory and regulatory powers already conferred to the Australian Communications and Media Authority (ACMA) which it ought to continue to be used to monitor compliance and exercise enforcement with respect to industry codes.

We again draw your attention to the fact that compliance with the code is necessary by law and the codes obtain the status of statute arising from the Telecommunications Act.

The requirement for self attestation of compliance is pointless and without utility given that such compliance is required by law.

In the event that the sole creation of the CC exists as a result of a lack of resources at ACMA, it is both reasonable and efficient for further resources to be allocated to ACMA to exercise their regulatory powers rather than create a separate entity. The separate entity will incur significant overheads in administration expenses without adding any value whatsoever in particular as section B.1 indicates that ACMA will continue to be the enforcement authority for code violations.

We strongly support the investigatory and regulatory powers of ACMA and encourage the continued enforcement of industry codes and laws by the authority.

Finally, there is no information regarding as to how the CC will be funded. In the event that the funding is sourced from industry, these costs will be passed onto customers. As such, any such organization will provide no utility to consumers, raise costs and reduce competition.

¹⁰ Beagle, 2010, Reconnecting the Customer Public Submission, <http://www.acma.gov.au/webwr/_assets/main/lib311946/122_beagle_internet-reconnecting_the_customer.pdf>, viewed 23 November 2011

3. Conclusion

Overall, we are extremely disappointed with the changes to the proposed code. In particular, the proposed regime:

- (i) Inconveniences consumers by introducing undue delay to service provision and activation;
- (ii) Fails comprehensively to provide tougher regulation which is practical and useful for consumers in the areas requiring remediation;
- (iii) Contains duplicate and redundant regulation already provided by statute or common law;
- (iv) Fails to regulate the industry in a manner which promotes competition, or reduces costs for consumers;
- (v) Creates regulation which adversely affects small and medium carriage service providers and removes consumer choice; and
- (vi) Fails to set responsibilities, accountabilities and standards for Consumer behavior when dealing with Suppliers resulting in a one-sided, draconian and unfair scheme of regulation.

We look forward to a new revision of the proposed code which adequately addresses consumer, competition and industry concerns.