



**Submission to the Department of Broadband,  
Communications and the Digital Economy**

**Review of Consumer-related Industry Code  
Processes**

**15 May 2009**

CHOICE is a not-for-profit, non-government, non-party-political organisation established in 1959. CHOICE works to improve the lives of consumers by taking on the issues that matter to them. We arm consumers with the information to make confident choices and campaign for change when markets or regulation fails consumers.

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CHOICE is pleased to provide a submission to the Department of Broadband, Communications and the Digital Economy on the Review of Consumer-related Industry Code Processes. We have no objection to publication of this submission.

We provide our comments in two parts. Part A describes generally the framework we believe is needed to provide adequate protections to consumers when engaging with telecommunications products and services. Part B provides examples of potential models of regulation. We refer to you the joint CHOICE/Galexia publication “CHOICE - Code Approval Options” for further detail.

## **Part A: Reform to the Code Framework**

Providing it contains adequate provisions to protect consumer welfare, co-regulation has certain advantages as a means to provide appropriate consumer protection in a fast changing industry such as Telecommunications

The current co-regulatory framework however does not provide adequate consumer protection. It falls well short of best practice for a co-regulatory system.

For a co-regulatory framework to meet the needs of consumers, the following are needed:

- 1) Articulation of high-level criteria/principles in legislation, against which any codes may be measured;
- 2) A new code development body that is able to take account of the interests of all stakeholders;
- 3) Effective code content and approval process;
- 4) An adequate system for the code compliance including monitoring and enforcement functions;
- 5) Regular code review; and
- 6) Access to effective External Dispute Resolution.

### **1) Articulation of high-level code-content criteria/principles in legislation, against which any codes may be measured**

It is important that legislation establish high level criteria which guide code developers and against which decision to approve a code can be made. They should include both process and content criteria. Process criteria might be that consumer interests have been adequately considered through consultation and other means. Content criteria might be that the code has devised solutions to all significant consumer problems in the area without imposing disproportionate costs on industry participants and without diminishing competition without justification.

An area of considerable weakness in the telecommunications co-regulation framework is the lack of integration between the legislation and the codes of conduct – especially regarding the content of codes of conduct. In many industry sectors legislation establishes a core set of consumer protection principles or requirements. These are then the subject of further enhancement and elaboration in codes of conduct. It would be possible to develop a list of core consumer protection principles for the telecommunications sector for inclusion in legislation.



For example, the Consumers Telecommunications Network (CTN) has developed a draft Charter of Communications Rights that contains the following core protections:

**1. Universal Access to Communications Services**

All people are entitled to a choice of communications services, wherever they live or work in Australia. Communications services include voice, video, text and data, or equivalent depending on the most appropriate technology for a particular user.

**2. Universal Accessibility of Communications Services**

All people are entitled to equal access to communications services regardless of ability. The needs of people with disabilities must be taken into account in the design of all communications services, and must be met with guaranteed and subsidised additional and/or alternative equipment and services if necessary. Services, including equipment, must be interoperable and allow for backwards compatibility wherever possible.

**3. Universal Affordability of Communications Services**

All people are entitled to communications services at reasonable cost, including price controls on basic services, and the availability of tools and mechanisms that allow them to control and limit their expenditure on communications. All communications services must provide a reasonable and accessible financial hardship policy to customers.

**4. Guaranteed Quality of Communications Services**

All people are entitled to services that guarantee a minimum level of performance to ensure reliable communications and, in particular, access to effective emergency services. Furthermore, all communications equipment and services must be safe, and both delivered and repaired in a timely manner.

**5. Consumer Protection**

All people are entitled to mandatory consumer protections of their communications services, including the right to be given the facts needed to make an informed choice, the right to education resources, the right to fair contracts, the right to privacy, and the right to security.

**6. Consumer Representation**

All people are entitled to have their needs represented in the development of communications services and policy in Australia through well-resourced consumer consultation and representative processes.

**7. Right to redress**

All people are entitled to an appropriate form of redress if a breach of their communication rights occurs, including access to an independent dispute resolution body.

To ensure that codes address consumers' interests, the code development body could be required to attach an explanatory statement to any proposed code, which explains how consumer interests are incorporated. This, together with the reconstitution of

code development bodies so that consumers form half the representatives (as outlined in the following point), should better ensure that consumer interests are adequately reflected in any proposed codes.

## **2 i) Consumer or industry initiated code development**

In order for code development to meet the interests of both consumers and industry, consumers, the regulator or industry should be able to initiate code development. The present structure whereby only industry may instigate code development has not been responsive to consumer needs. There are several examples of unnecessary delays in code development, the most notorious and egregious of which is the Mobile Premium Services Code which will finally be in place on 1 July 2009 more than five years after these services were first permitted with their easily predictable problems.

### **ii) Code development body constituted of equal numbers of industry and consumer representatives**

The current rules about the code development process are not specific about the mechanism for code development. Legislation should provide that code development must respond to the interests of affected stakeholders and permit the regulator to issue guidance from time to time and in specific cases.

There are currently no provisions that require independent consumer input to code development or prevent ACMA from registering a code which does not have consumer input. There are no adequate requirements for consultation with affected consumers or their representatives. There is no provision for the funding of consumer input, or a requirement that consumer consultation should be adequate and reasonable (e.g. regarding the time allowed for consultation). All of these elements are common in other industry sectors.

The starting point for an adequate code development process should be equal consumer and industry representation to ensure that consumers' interests are adequately represented. Such an equally-constituted code development body is the best way of ensuring that all interests are adequately addressed. The one concern about such a body is the potential for deadlock addressed in the next section.

### **ii) Creation of a mechanism to break any dead-locks in the code-development process.**

Assuming that a reformed code development body contains equal numbers of industry and consumer representatives it is likely, from time to time, that an impasse may arise, stalling agreement on a code.

CHOICE believes that some form of dead-lock mechanism should be considered. Whatever form is chosen it must be independent. One possibility is to seek the views/research from an academic (institution) about the area of disagreement, along with a proposed solution. An alternative, drawn from the current framework, is that the regulator could have the power to develop a 'standard' that is binding, in the event that the code development process fails.



### **3) Effective code content and approval process**

Once a code has been created, the regulator should only approve it if it is consistent with the high-level consumer protection principles, as proposed in point 1. It should seek public comment on a draft code before making a decision.

### **4) Code monitoring and enforcement**

The legislation governing the development and authorisation of consumer codes should include a requirement that the code include appropriate measures for monitoring and enforcement. While there may be benefits in flexibility depending on the content of a particular code, in general the arrangements should include but possibly not be limited to monitoring and enforcement by the regulator. One system that can supplement the regulator is for the complaint handling body to have an obligation to report regular and systematic breaches of the code by an industry member to the regulator for review and possible action.

Where the regulator becomes aware of any systematic code compliance issues (whether on the advice of the complaints body or otherwise) it should consider taking enforcement action.

The regulator should also have the power to undertake additional monitoring, including audit and shadow shopping tools where it is concerned that there may be breaches.

It will often be appropriate for regular compliance reports to be published, especially where the code is intended to lead to significant behaviour change by all or some industry players. Legislation should provide relevant powers to regulators to support publishing by the regulator or a code administration body.

The current arrangements in telecommunications do not provide consistent compliance monitoring approach across the entire industry, as the current disjointed approach is split between signatories and non-signatories.

### **5) Regular code review**

There should be a requirement that each code is subject to regular independent review, generally every three years with the power for the regulator to require a more frequent or ad hoc review with cause. Adequate resources should be provided for consumer input to code reviews.

### **6) Access to effective External Dispute Resolution**

CHOICE believes that external dispute resolution for consumer complaints is essential. The Telecommunications Industry Ombudsman (TIO) has to date served this function reasonably well and it would be an appropriate EDR body in any future structure. Whatever code development and authorisation model is adopted should ensure that



consumers continue to have access to the TIO in relation to disputes under those codes.

## Part B: Models for consideration

### Preferred model

For several reasons CHOICE has come to the view that the preferred way forward is, subject to some important conditions, for the Australian Competition and Consumer Commission (ACCC) to be the regulator responsible for managing the initiation, development, approval, monitoring and enforcement of telecommunications codes.

There are a broad range of industries in which codes of conduct are effective solutions to market failings. Rather than developing different systems in each industry, it would be better to create a best practice framework as part of the Trade Practices Act (TPA)/ Australian Competition and Consumer Act.

A significant caveat is that the current TPA provisions are not adequate. The code related provisions in the TPA would have to be significantly altered, or new provisions added, to enable the ACCC to effectively regulate consumer codes. The ASIC Code development framework would be a potential model for these altered or new provisions. Important elements of the relevant provisions of the Corporations Law empowering ASIC in relation to code development and administration include:

i) ASIC regulatory guidelines state that codes will only be considered for approval that are developed and reviewed in a transparent manner which involves relevant stakeholders - including consumer representatives<sup>1</sup>.

ii) Requires codes to provide for regular independent review at intervals of not more than 3 years<sup>2</sup>.

iii) For code approval by the regulator, the following guidance is provided regarding code content:

- must be enforceable;
- be developed in a consultative fashion so as to address a broad range of issues of real concern to consumers;
- set standards that elaborate on, exceed or clarify the law;
- have compliance monitoring; and
- provide remedies and sanctions for breaches of the code.

v) The regulator approves codes - not an industry body.

vi) Threshold code approval criteria include<sup>3</sup>:

- code must be developed transparently with relevant stakeholders
- code must have effective and administration and compliance mechanisms

Other relevant criteria include:

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<sup>1</sup> Regulatory Guideline 183.13

<sup>2</sup> Regulatory Guideline 183.81

<sup>3</sup> Regulatory Guideline 183.13

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- an appropriate process for developing the code;
- plain language provisions that deal with the code's scope, objective and core rules;
- adequate dispute resolution procedures, remedies and sanctions;
- effective arrangements for monitoring and reporting on compliance; and
- regular independent reviews, at intervals of not more than 3 years.

### Alternative Model

If the Australian Communications and Media Authority (ACMA) remains the regulator for telecommunications consumer codes, a number of changes to the framework are needed. CHOICE is comfortable with the code development remaining a co-regulatory process. However, the code development process must require that:

- i) both industry and consumer representatives may initiate code development;
- ii) the code development body must consist of equal industry and consumer representation;
- iii) codes should only be approved by the ACMA where minimum criteria are met, including:
  - that the ACMA is satisfied that the code provides effective solutions to consumer problems without a disproportionate impact on business and without any unjustified limitation on competition;
  - that the code is consistent with high-level consumer principles enshrined in law<sup>4</sup>, and that the code elaborates or builds on these;
  - that the code includes effective compliance monitoring mechanisms, as outlined in part A, point 3;
  - that the code includes appropriate remedies for consumers and adequate enforcement is available; and
  - that the code includes an appropriate review process.

### Conclusion

CHOICE commends the Department of Broadband, Communications and the Digital Economy for initiating this review of consumer-related industry code processes. We have long pointed out the deficiencies with the current processes and last year specifically called for a review of the framework for consumer-related telecommunications codes. The deficiencies to date, exemplified most recently and starkly by the failed MPS Code development process, require a departure from an industry dominated process, to one in which both consumers and industry have their interests comprehensively addressed. This will help ensure a dynamic communications sector into the future.

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<sup>4</sup> As referred to in Part A, point 1.