

# Consumer Protection Enhancements for the Australian Telecommunications Industry

Shane Barber reviews the work of both Communications Alliance and the ACMA in 2011 as they seek to address the Australian telecommunications consumer protection regime

The telecommunications industry, its regulators and its consumers have spent much of 2011 analysing, debating and reforming the Australian telecommunications consumer protection environment. The result is the publication of two influential works, being:

1. The Australian Communications and Media Authority's (**ACMA**) final *Reconnecting the Customer* report, published on 9 September 2011 (*Reconnecting the Customer*); and
2. Communications Alliance Limited's (**Communications Alliance**) draft *Telecommunications Consumer Protections Code 2011* released for public comment on 25 October 2011 (**2011 Code**).

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Both works have been the subject of considerable consultation undertaken throughout 2010 and 2011 and are published after a year in which much media analysis was made of the telecommunications industry's performance in relation to the consumer experience. Both also come in the wake of the implementation of the new *Competition and Consumer Act 2010* (Cth) (**CCA**).

While both documents point to considerable reforms in store for the industry in 2012, a closer analysis of the documents reveals that both the regulator and industry have finished the year with substantially similar outcomes, with the variances being largely one of degree.

## Telecommunications Consumer Protection Code

### Background

Under the telecommunications industry's self regulatory environment, established by the *Telecommunications Act 1997* (Cth) (**Act**), bodies representing sections of the telecommunications industry are encouraged to develop industry codes. Communications Alliance, variously named, was formed in 1997 to fulfil that role for industry participants.

Pursuant to the Act, Communications Alliance may submit its various draft codes to the ACMA for registration and once registered, the ACMA may take enforcement action against industry participants who do not comply with them.

Importantly, the ACMA is not obliged to register codes proffered by the industry and, in some circumstances, may make its own industry standards which will apply to industry conduct in place of or in addition to codes prepared by the industry. For instance, the ACMA may prepare its own standard if it is satisfied that an industry code is

deficient and that deficiency is not addressed by the industry prior to the end of a remedy period.

Back in 2007, Communications Alliance published and registered its initial *Telecommunications Consumer Protections Code 2007* (**2007 Code**), being a consolidation of a number of more specific codes published prior to that time. The 2007 Code was scheduled for a review in 2010/2011, a time which coincided with heightened community expectations of telecommunications industry participants in this regard.

Communications Alliance's work in reviewing the 2007 Code occurred over an 18 month period, led by a Steering Group comprised of industry representatives, consumer representatives and representatives from the ACMA, the ACCC and the Department of Broadband, Communications and the Digital Economy. The drafting work for what is a considerable document was largely undertaken by six Working Committees comprised of industry and consumer representatives.

Shortly before publication of its draft 2011 Code for public comment, Communications Alliance received a notification from the ACMA under section 125 of the Act indicating the ACMA's view that the 2007 TCP Code was now deficient, with a remedy required by early February 2012. The ACMA's *Reconnecting the Customer* report, discussed in more detail below, presumably indicates the ACMA's views on how the perceived deficiencies ought to be remedied. That said, as the ACMA's public inquiry leading to the *Reconnecting the Customer* report was undertaken at the same time that the Communications Alliance Steering Group and working committees were meeting to devise the 2011 Code, many of the ACMA's concerns regarding advertising practices, product disclosure, performance reporting, expenditure management tools and complaint handling practices had already been included in the 2011 Code.

### 2011 Code Drafting Overview

Those familiar with the 2007 Code will notice a significant change in the presentation of the 2011 Code. While the same general areas are covered in both versions, the 2011 Code has been substantially rewritten. Indeed it would be true to say that while the 2007 Code had industry participants as its sole audience (for example, customer facing staff within a carrier or carriage service provider), the 2011 Code also addresses the consumer audience.

The drafting style adopted across each of its nine chapters is one of stipulating outcomes, generally commencing with words "a Supplier must ....", followed by considerable detail which establishes the minimum performance requirements and actions of industry participants to achieve these outcomes, including in some cases details of consumer "entitlements".

As noted below, there are a number of areas of the 2011 Code which are either covered for the first time, or to which significant enhancements have been made since the 2007 Code. For instance:

- there is a new compliance framework under the auspices of a new body, Communications Compliance;

- spend management tool obligations on carriage service providers have been significantly extended;
- product disclosure and advertising obligations have been enhanced considerably;
- complaint handling timeframes and obligations have been tightened;
- there are additional obligations regarding vulnerable customers; and
- there is greater emphasis on providing easily accessible consumer information in plain language.

It is important to note that the provisions of the 2011 Code referred to below may change in light of comments made in the public comment period underway at the time of writing.

### **Consumer Sales Service and Contract**

Chapter 4 of the 2011 Code, covering consumer sales, service and contracts, encompasses at least three significant innovations:

#### **Summary of Consumer Offers**

A supplier must now provide a summary of each of its then current generally applicable offers to allow consumers to make comparisons. The document is of course different to the summaries required by the Act to be prepared in relation to standard forms of agreement. The contents is prescribed, and will need to include such items as:

- all key pricing information;
- for mobile post paid services, details of the cost of 2 minutes of a standard national mobile call (and an explanation of what constitutes such a call), the cost of a standard national mobile SMS and a similar explanation, and the cost of 1 megabyte of calls, SMS and data usage within Australia;
- details of any inclusions, exclusions, conditions or limitations;
- a "single price", as defined in the CCA;
- explanations of contract expiry or roll over, contract length and exit and termination fees; and
- how to access spend management tools.

It is important to note that for post paid services this document is to be provided prior to sale (with the exception of unsolicited consumer sales), or alternatively consumers can opt out of receiving the document prior to sale (but will still receive it after sale) after having been given a general overview of its contents. The document must also be available online for prepaid offers.

The summary must comprise no more than two A4 pages in plain language, and meet all other requirements under the telecommunications and consumer protection legislative regime. Needless to say, preparing the summary of offers is likely to become an art form in itself as in-house legal advisers and external law firms seek to meet all of the requirements in the space prescribed.

### **Advertising**

Chapter 4 of the 2011 Code also provides some extensive prescriptions for the manner in which telecommunications goods and services may now be advertised. Many of the new requirements substantially reflect an undertaking made by Vodafone, Optus and Telstra to the ACCC in 2009 in relation to advertising. Effectively, that undertaking will now apply to all industry participants.

Importantly, when advertising an "included value" for mobile post paid services in online and print media of certain types and sizes, suppliers must, among other things, disclose the following three standard pricing elements in a prominent position:

- the cost of two minutes of a standard national mobile call;
- the cost of a standard national mobile SMS; and
- the cost of one megabyte of data within Australia.

#### **"Caps"**

"Cap" is an expression which has been used for a considerable period of time by the telecommunications industry. During the ACMA's pub-

lic inquiry and in the research undertaken by the Communication Alliance for the 2011 Code, it became clear that some further clarification was required.

Under the 2011 Code, new products and services which are offered after the date of Code registration must cease to be subject to the expression "cap" unless it is used to describe a "hard cap". A hard cap, for the purposes of the 2011 Code, means a maximum limit applied to a customer's use of telecommunications services where that limit cannot be exceeded. For existing products and services, when advertising caps, suppliers must make it clear that customers may need to pay more than the monthly quoted cap amount.

***This arises out of a concern expressed by consumers and regulators alike that "bill-shock" was a significant factor leading to complaints against suppliers by customers***

### **Billing**

While a number of the provisions in the billing chapter of the 2011 Code have strong similarities to those found in the 2007 Code, the new provisions apply more extensively to prepaid services. Further, greater historic billing information must be provided to a customer upon request and must be provided in relation to both prepaid and post paid services. It is proposed that billing information must now be provided (if requested) free of charge for 13 months after a charge has been incurred, and then with a fee for another six years.

There is now greater clarity as to what a bill must contain. Bills must include:

- sequential numbers to enable customers to identify chronological order;
- the same customer reference for online payments for each bill if it relates to the same service;
- at least one free bill payment method, with advice provided on charges which will apply to other methods;
- the name of the service to which the bill relates;
- itemisation of charges and identification of charges that exceed spend limits or included allowances and, where exceeded, an explanation of the effect on charging as a consequence;
- an explanation of how to access usage details;
- greater description of charges included in the bill, including total amounts; and
- where the bill relates to a cap plan, the total amount of each of the previous two bills.

### **Credit and Debt Management**

The 2011 Code places a significant emphasis on the provision of spend management tools to consumers. This arises out of a concern expressed by consumers and regulators alike that "bill-shock" was a significant factor leading to complaints against suppliers by customers.

Under the 2011 Code, carriage service providers must provide a comprehensive list of available spend management tools in prominent, easily navigable and searchable positions on their website.

In what will result in a significant investment requirement for carriage service providers, suppliers must now provide mandatory notifications to consumers to enable them to manage their spend on telecommunications services. For residential customers, where the supplier is offering a post paid mobile or internet plan with an included data allowance (and in circumstances where no shaping, throttling or hard caps apply), suppliers must provide customers with a notification once that customer has used:

- 50% of the data allowance included in their plan;
- 80% of that allowance; and
- 100% of that allowance.

In the latter case, the notification must also include information as to whether excess data charges will apply after that time.

These notifications need to be provided no later than 48 hours after the customer has actually reached the relevant usage point. There is provision for opt out and variations with customer express consent. In addition, these reforms do not need to be implemented until, at the latest, 12 months after the 2011 Code is registered.

Another issue which was addressed by the 2007 Code and which has received significant enhancement in the 2011 Code, are the financial hardship obligations which are applicable to suppliers. Suppliers must have a financial hardship policy which is set out in a prominent, easily navigable and searchable position on its website. If a customer wishes to have that policy applied to it, suppliers must assess the eligibility of that customer within seven working days of receiving all the required information from it. Reforms also include providing details of community financial counsellors on the website of a carrier's service provider.

### ***Suppliers must have a financial hardship policy which is set out in a prominent, easily navigable and searchable position on its website***

#### **Changing Suppliers**

In the preparation of the 2011 Code, a number of participants expressed concern about the amount and timeliness of information provided to consumers when the supplier of services changes.

One issue which was not considered to be adequately addressed in the 2007 Code arises in circumstances where a transfer of a supplier's business has arisen as a result of either a sale or a corporate reorganisation inside the same group of supplier companies. In such circumstances, suppliers now have an obligation to inform customers of any known materially adverse effects, with customers being informed of the ability to terminate their contract with a 30 working day notice period if they wish to do so as a result of the merger or reorganisation.

#### **Complaint Handling**

The telecommunications industry has long been served by the Telecommunications Industry Ombudsman (**TIO**) as its key complaint handling body. Indeed, the perceived health or otherwise of the industry is often measured by the rise and fall in the number of complaints made to the TIO.

The obligations on carriers to promote the complaint handling services of the TIO needs, of course, to be balanced with encouraging suppliers to deal with complaints internally before the resources of the TIO are used.

In this regard, the 2011 Code now provides more clarity as to what constitutes a customer complaint (as opposed to a mere inquiry or fault report) and provides some tight timeframes for complaint acknowledgement and resolution by the supplier in the first instance. Examples include:

- the requirement for suppliers to immediately acknowledge a telephone or "in person" complaint, or within two working days for all other complaints;
- these complaint acknowledgements are to include unique reference numbers and identifiers and provide an indicative framework for resolution by the supplier;

- suppliers must finalise complaints within 15 working days from receipt of a complaint, or as soon as practicable in the circumstances; and
- for urgent complaints, suppliers are required to provide written confirmation of the resolution path and set into motion that resolution within two working days.

There are now clear obligations upon the supplier to advise of the complaint outcome and, if requested, to provide a written confirmation of that outcome.

Balancing this increased emphasis on resolution of complaints at the supplier's level, suppliers are also required to explicitly promote the services of the TIO and keep the TIO informed of certain of its complaint handling activities.

#### **Communications Compliance**

One of the key innovations of the 2011 Code is a greatly enhanced compliance and monitoring regime. A new independent body, Communications Compliance, has been created to monitor Code compliance by suppliers.

Suppliers will be required to implement and comply with a code compliance framework set out in Chapter 9 of the new Code. In essence, this involves:

- promoting awareness of the Code to its customers;
- preparing an annual statement (a "Customer Information Compliance Statement") which specifies where the supplier's customers may access the supplier's information which is required to be made publicly available under the Code; and
- preparing and maintaining a documented compliance plan which outlines the initiatives of the supplier relating to its compliance with the Code. This plan must be prepared in accordance with the relevant Australian Standard.

In addition, suppliers must provide Communications Compliance with certain prescribed statements, with requirements varying depending on the size of the relevant supplier. In the case of large suppliers (as defined in the Code), these statements require annual attestation of Code compliance, along with a statement from an external qualified assessor that the relevant Australian Standard has been met. Small, medium and new entrant suppliers will also need to provide their compliance attestation to Communications Compliance on an annual basis but these will need to be signed by a chief executive or the board of that supplier.

If the supplier is unable to make the attestations and give the statements referred to above, a new regime will apply pursuant to which that supplier may give "Compliance Achievement Plans" to Communications Compliance detailing how and when actions will be taken to ensure that supplier's compliance.

It is envisaged that Communications Compliance will be governed by a three member board. One board member will be nominated by Communications Alliance and a second will be nominated by consumer representatives, both of whom will then nominate an Executive Director. The day to day affairs of Communications Compliance will again have equal representation from industry and consumers under the direction of that Executive Director.

It is anticipated that Communications Compliance will enter into a Memorandum Of Understanding with each of the TIO, the ACMA and the ACCC to ensure efficient inter-working and to avoid duplication.

#### **Reconnecting The Customer**

At around the time the 2011 Code draft was taking its final shape, the ACMA published its *Reconnecting the Customer* final report. With the ACMA having visibility of much of the work of the Communications Alliance Steering Group, it is not surprising that many of the recommendations under the *Reconnecting the Customer* report anticipate and extend upon many of the initiatives in the 2011 Code.



As mentioned above, the ACMA has given clear indication in its section 125 notice that it expects the five key proposals from the Reconnection the Customer report described below to be accommodated in the 2011 Code.

### Improved Advertising Practices

The ACMA has focused particularly on the use of the expression "caps". As noted above, this same issue occupied much of the discussion time in the preparation of Chapter 4 of the 2011 Code regarding advertising.

Essentially, for products that are not subject to a hard cap or shaping of data use, the ACMA proposes that suppliers, in text based advertising, clarify minimum monthly spend representations with the inclusion of:

- standardised rates disclosing the cost of making a two minute call in Australia to another mobile (based on the highest rate charged under the plan for making that call, plus flag fall), sending a standard SMS in Australia, and downloading one megabyte of data in Australia; and
- an estimate of the volume of calls included in the plan, based on the standardised rate disclosed and assuming that the value that can be used on either calls or SMS was used on calls only.

### Improved Product Disclosure

The ACMA proposes that service providers be required to provide a critical information summary to consumers before a sale that:

- summarises critical information about the product; and
- provides consumers with non product specific information (for example, customer service contact details and how to access spend management tools).

As noted above, this is largely accommodated by the current draft of 2011 Code.

### Performance Reporting and Customer Service Charters

The ACMA is seeking industry proposals regarding metrics which can be used to measure customer care performance, including timely complaint resolution, and implementing a metric reporting framework for service providers with more than 30,000 residential or small business customers. It is intended that these metrics will be published.

Chapter 9 of the 2011 Code requires that suppliers provide to Communications Compliance annually, or more frequently if required, a report in a format required by Communications Compliance detailing metrics that relate to that supplier. Those metrics may relate to any of the obligations of the supplier under the Code. The Chapter also requires Communications Compliance to agree to the scope of metrics within six months of Code registration.

Presumably then, this avenue will be used to address this concern of the ACMA. The ACMA has flagged however, that if industry does not implement its own metric reporting framework the ACMA will directly require suppliers to provide it with the required information, including information regarding:

- the total number of contacts made by existing customers;
- the number of repeat contacts made by the same customer within a 45 day period;
- the total number of complaints received by the service provider; and
- the total number of the service provider's residential and small business customers.

### Expenditure Management Tools

While the provision of enhanced spend management tools may greatly assist consumers, there is of course a risk that consumers may be inadvertently disadvantaged if such requirements are so burdensome that it effectively forces smaller retailers out of the market (and, as a result,

diminishes competition), or if the large costs of implementing these changes is passed on to consumers.

It appears, however, that both Communications Alliance and the ACMA have landed in a similar but not identical position, with the ACMA's proposed expenditure management tools requiring notification via SMS for phone usage, and an email for internet usage that alerts consumers at specific expenditure and usage points (such as 50% or 80%, and at 95%). The alert should also include details about the expenditure or usage point reached and the consequences of any exclusions (such as roaming). The key difference appears to be that the ACMA is seeking notifications in relation to SMS and voice, as well as data (as proposed by the 2011 Code).

Like the 2011 Code, the ACMA's recommendations also require certain historical information to be revealed on bills.

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### External Complaints Handling

Similarly, much of the proposal by the ACMA in relation to internal complaints handling appears to have been addressed by the 2011 Code in Chapter 8.

The ACMA proposes that service providers be required to implement a complaints handling procedure that:

- adopts the definition of a complaint set out in the *Australian Standard for Complaints Handling* (AS ISO 10002-2006). This is expressly achieved by 2011 Code;
- complies with the guiding principles set out in that Australian Standard. This is already addressed by the 2011 Code; and
- establishes minimum benchmarks for ensuring timeliness in dealing with complaints, documenting procedures and collecting, analysing and reporting complaints information.

### Changes to the TIO Scheme

Finally, the *Reconnecting the Customer* report recommends some changes to the TIO scheme which are beyond the scope of the 2011 Code. No doubt, however, those proposed changes, if they are implemented, will impact on the proposed Memorandum of Understanding between the new Communications Compliance body and the TIO.

### Conclusion

While the gestation period for both the 2011 Code and *Reconnecting the Customer* has been long, the journey to create them has been intertwined and, as a result, the difference between their outcomes is not great.

Whether those differences are, in the view of the ACMA, still sufficient for it to either reject the 2011 Code, excise parts of it and/or implement its own standard is yet to be seen.

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