



Reconnecting the Customer

Submission by the Australian Communications Consumer Action Network
to the Australian Communications and Media Authority



10 September 2010



About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on telecommunications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of telecommunications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all telecommunications consumers.

Contact:

Elissa Freeman, Director Policy and Campaigns

Suite 402, Level 4

55 Mountain Street

Ultimo NSW, 2007

Email: elissa.freeman@accan.org.au

Phone: (02) 9288 4000

Fax: (02) 9288 4019

TTY: 9281 5322



TABLE OF CONTENTS

Introduction 4

Response to Reconnecting the Customer 5

1. Consumer Experiences in the Telecommunications Industry 5

 1.1 Analysis of complaint data 5

 1.2 ACCAN member survey..... 7

 1.3 Customer experiences 8

2. Systemic Failures in the Consumer Protection Framework 10

 2.1 Ineffectiveness of Consumer Codes 10

 2.2 Ineffectiveness of Institutions 12

 2.3 Market failures 14

3. Improving consumer outcomes 15

 3.1 Legislative Framework 15

 3.2 Consumer Protection Standards 16

 3.3 Consumer Codes 18

 3.4 Performance Reporting 21

 3.5 Enforcement 23

 3.6 Consumer Compensation 24

Conclusion 24

Introduction

This submission analyses the consumer experience of the telecommunications industry and identifies the root causes of poor performance with respect to customer service and complaint handling. We propose a new paradigm for consumer protection in the telecommunications industry based around meeting consumers' expectations of their telecommunications providers.

ACCAN believes that the customer experience in the telecommunications industry has plummeted and major providers now acknowledge the need to improve their standards of customer service. But the telecommunications industry is not adequately dealing with basic consumer protections like complaint handling, credit management and financial hardship.

We are also acutely aware that more challenges lie ahead, particularly with the development of the National Broadband Network (NBN) as more complex and converging products enter the marketplace. It is vital that unfair practices in the current telecommunications market do not migrate to the retail service providers on the NBN.

A plethora of consumer codes were developed over the last decade under the auspices of the Australian Communications Industry Forum (ACIF). In 2008, the Communications Alliance consolidated almost all the consumer codes (some 6 separate codes) into a single code: the Telecommunications Consumer Protection Code. ACCAN acknowledges the time and resources put into constructing these codes over the past decade. But we are nevertheless at the point where we must conclude that the consumer codes, alone, have proven ineffective in delivering an adequate standard of customer care.

Reforms enacted in the late 1990s saw Australia enter into a bold experiment in self-regulation in the telecommunications industry. But the singular reliance on co-regulatory codes has proven to be a woefully inadequate toolkit in driving adequate consumer protection standards and empowering consumers in a fair, efficient and sustainable market. We believe that co-regulatory codes can remain an important feature of the telecommunications markets but only if they are more robust and complemented with a suite of additional regulatory measures.

This submission puts the case for an expanded regulatory toolkit to improve consumer protection outcomes in the telecommunications industry. We believe customer service and complaint handling can be improved by adopting:

1. **Consumer Protection Standards** – enacting mandatory standards for key consumer protection issues such as internal dispute resolution, external dispute resolution and financial hardship, developed and enforced by the regulator to ensure enforceable, minimum requirements in these areas.
2. **Performance Measures** – establishing a mandatory public quarterly reporting regime on internal complaints, customer service, credit and debt issues.
3. **Improved Industry Code** – enacting explicit legislative guidance on consumer protection codes and stricter rules on their registration requirements including compliance, independent monitoring and enforcement, and equal consumer representation on all code working committees.
4. **Expanded Compensation Arrangements** – to enact a suite of compensation payments to consumers for breaches of industry codes and standards, for example



for failing to action a complaint. This would expand significantly on the financial compensations currently available under the Customer Service Guarantee.

5. **Real Enforcement tools** – ensuring the responsible regulator can promptly and effectively respond to breaches of laws, codes and standards by making directions, seeking undertakings and setting deadlines where necessary.
6. **Super-complaint rules** – to empower designated organisations (such as ACCAN and the TIO) to refer systemic market issues to the regulator for action
7. **A new object for the Act** – to remove the self-regulatory bias from (at the very least) consumer protection arrangements so that regulators have responsibility for ensuring minimum consumer protections
8. **A new role for the ACCC** – ensuring a better regulatory integration between general and industry specific regulations and greater enforcement action

The expanded regulatory toolkit will provide for a more balanced and flexible approach to consumer protection in a rapidly changing (and increasingly critical) marketplace. To set this course will require a clear break from the past. It requires us to view telecommunication as an essential service industry with a need for high standards of service and customer care.

The telecommunications industry is too important to be failing consumers. Yet its rules, regulations and complaints handling process are groaning under the demands of the twenty first century. We need accessible, affordable and available telecommunications services and that requires major regulatory reform, structural reform of institutions and preparedness by industry to partner with their customers and regulators for a better and fairer market.

Response to Reconnecting the Customer

1. Consumer Experiences in the Telecommunications Industry

Last month ACCAN was contacted by an exasperated customer of one of the major players in the Australian telecommunications industry. The customer told us that she had not been able to receive calls, not been able to make calls and experienced extended delays in receiving and sending SMS messages. She had contacted her telecommunications service provider on no fewer than eight occasions, making detailed notes of each conversation and retaining copies of all correspondence. After four months of frustration, and a complaint to the external dispute resolution body, the customer told us she wasn't getting anywhere.

'War stories' of customers' dealings with the Australian telecommunications industry are unfortunately far too common.

1.1 Analysis of complaint data

As the Consultation Paper identifies, in 2009 the Telecommunications Industry Ombudsman (TIO) reported a 60% increase in complaints. As at March 2010, TIO complaints appear to be in decline but this is coming off an extraordinarily high base. During the 2008/09 financial

year the TIO logged an astounding 481,418 complaint issues from over 260,000 telecommunications customer complaints. Complaints to the scheme increased across the full suite of internet, mobile and landline services. These figures continued a pattern of poor performance that has been getting worse in the years since the TIO was established. But the 2008/09 complaint rates are unprecedented and evidence of a major breakdown in the quality of services by Australian telecommunications providers.

Telecommunication customers made over 110,000 complaints to the TIO about billing and payments issues, while customer service issues were recorded at around 100,000 complaints overall.¹ Both categories of complaints were nearly twice as high as the year prior. The sharp increases in complaints can't be ascribed to a specific market event. On the contrary, the TIO ran its "Connect.Resolve" campaign which was specifically designed to improve internal complaints handling processes for basic complaint issues. Similarly, the TIO did not significantly increase its publicity in recent years, so awareness levels can be assumed to be static.

The billing and payments categories show disputes arising across the full spectrum of issues – ranging from disputed fees and charges to failure to provide bills on request – so there is not an isolated failing on the part of providers. Further, the complaints are spread right across the industry from the biggest providers to the smallest ones.

The huge increase in customer complaints is not mirrored in other essential industries such as electricity, gas, water, insurance and banking. Direct comparisons of complaint trends across Australia's various Ombudsman schemes are difficult to make. However it is possible to compare the overall complaint numbers and the rate of increase in complaints. The Financial Ombudsman Scheme (FOS), a national dispute resolution scheme for the financial services industry, recorded 19,107 complaints in 2008/09, which was a 33% increase on the previous year.² The Energy and Water Ombudsman of New South Wales (EWON) is a state-based external dispute resolution scheme which handled 10,928 complaints in 2008/09 representing an increase of 18% on the year prior.³ Interestingly, all three schemes share common priority concerns around billing, credit management and customer services issues. However, there is a significantly larger volume of complaints to the TIO than comparative national schemes like FOS and the volume of complaints to the TIO is increasing at a much faster rate than both FOS and EWON.

By way of international comparison, the rapidly escalated volume of complaints in Australia's telecommunications industry is at odds with complaint trends in the United Kingdom. The United Kingdom's Office of the Telecommunications Ombudsman (OTELO) provides a similar role to Australia's TIO but services a population three times Australia's population (although the OTELO's industry membership is one third the size of the TIO). In 2009, the OTELO handled less than half the number of consumer contacts of the TIO.⁴ However an increase in the number of ombudsman determinations at OTELO suggests that the complexity and severity of complaints may be on the rise. An interesting insight is provided by the OTELO Ombudsman, who observes;

"Changes in technology have changed the precise nature of complaints but the essentials of them remain familiar. Failures in meeting customer expectations are at the heart of any complaint. We see misunderstandings about the package purchased, raised expectations about what can be provided (particularly in relation to

¹ TIO, Annual Report, 2009

² Financial Ombudsman Service, 2009, *Annual Report* accessed at <http://www.fos.org.au/fos/Disputes.html> on 13 February 2010

³ EWON, 2009, *Annual Report* accessed at http://www.ewon.com.au/online/ar_08_09/ombudsman.html#overview on 13 February 2010

⁴ OTELO, 2009, *Annual Report*, page 2, accessed at http://www.otelo.org.uk/downloads/Otelo_Annual_Report_2009_copy_1.pdf on 13 February 2010



broadband speed and reliability), but above all we see examples of poor communications with customers.”⁵

Data from the TIO would appear to support a similar case in Australia. While telecommunications technologies have developed, basic customer service has not improved.

1.2 ACCAN member survey

In May 2010 ACCAN undertook a survey of its members to identify their concerns around customer service in the telecommunications industry. Members were asked to identify key customer service problems, the areas in which they would like to see improvements, and to suggest ideas about how things can be improved. Of ACCAN's 139 individual and organisational members, 45 responded to the survey with half answering in an organisational capacity and half in an individual capacity.

Major customer service problems

When asked what the biggest problems with telecommunications customer service are, the following four statements ranked highly:

- Multiple transfers to get to the right person to deal with your issue
- The cost of contacting customer service (e.g. when calling from a mobile)
- Poor access for people with disabilities
- Outsourcing of contact centres overseas

Customer Service Standard – a useful benchmark

There was high support by respondents (92.7%) for the concept of a customer service standard requiring public reporting against a set of performance measures. When asked more specifically what sorts of performance areas members thought a customer service standard should cover, the following ranked highly:

- Complaint resolution, which are efficient and responsive
- On-hold and wait times which are not excessive
- Requirements to report about external and *internal* complaint volumes
- Minimum levels of quality for service and repair times
- Staff communication - ensuring staff have good communication skills and clear English language skills
- Requirement for high quality and correct information

Priority areas to ensure improved customer service

When asked about what changes could be made to improve telecommunications customer service, members provided a wide range of responses with the following areas listed in order from most cited:

- Increased investment in staffing and staff training
- Demand for clear, comparable and complete information about products and services
- Improved complaint handling, including the ability to speak to the same customer service person, fewer internal transfers and a reduction in queue and wait times
- Increased penalties and enforcement

⁵ *Ibid*, p4



- Ensuring the needs of people with disabilities are met, including calls for an independent disability equipment plan, online information for people with disabilities, audio-loops and less noise in stores

ACCAN members desire efficient and responsive customer service, as well as the provision of clear and useful information. They would also like to see serious penalties and enforcement, and the meeting of the needs of consumers with disabilities.

1.3 Customer experiences

As a result of its growing reputation and media representation, ACCAN has been receiving an increasing number of complaints and queries from members of the public. This is despite ACCAN not being a complaints handling body. It is evident that many consumers are not aware of the Telecommunications Industry Ombudsman (TIO), as they reach out to ACCAN for assistance with their customer service complaint. On average, ACCAN receives correspondence from three new customer contacts per week. In its first year of operation, ACCAN has received almost one hundred complaints and queries from Australian telecommunications customers. Of these complaints, the following are common issues that have arisen which suggest systemic failures in customer service.

Overseas-based call centres

Many consumers who have contacted ACCAN have expressed frustration when dealing with customer service representatives who are based in overseas call centres. Consumers have reported finding it difficult to converse and understand the accents of overseas customer service representatives. ACCAN has been in discussions with consumers who are tired of the miscommunication experienced on both ends of the phone call.

The digital divide

In an age where the internet is increasingly important in sharing information from provider to customer, it is notable that a large number of vulnerable consumers either do not have access to the internet or are digitally illiterate. ACCAN has been approached by seniors who, in particular, do not use the internet and have had difficulty in understanding overseas customer service representatives. Recent research has demonstrated that only 29% of those who are 65 years or older use the internet, as opposed to 87% of Australians who are 44 years old and younger.⁶ Consumers without internet access rely heavily on phone or face to face contact with their service provider in order to find answers to their queries.

Training

ACCAN is deeply concerned about the training of customer service representatives in the telecommunications industry. Throughout ACCAN's correspondence with consumers who have complaints, issues such as a lack of empathy towards personal concerns, insufficient answers and the service provider not following through on its promises has proven to be very trying for customers. The root of these issues, as detailed below, can be traced back to the inadequate training of customer service staff.

No real 'service'

Telecommunications customers have grown increasingly impatient from being unable to access a customer service representative who can answer their questions. Consumers who have contacted ACCAN have concerns for being placed on hold for extensive periods of time and continually being transferred from department to department without an answer or

⁶ Australian Telecommunications Consumer Action Network, 2009, *Future Consumer: Emerging Consumer Issues in Telecommunications and Convergent Telecommunications and Media*, Quest Publishing, Brisbane, p.31.



solution to their issue. Consumers are also weary of being told they will be contacted at a later date and in reality, no follow-up is actioned by the provider.

Inconsistent messages

ACCAN has been approached by consumers who have been told different information from their service provider on the various occasions they have called. This demonstrates a lack of quality training in customer service centres. As a consequence of the poor quality of information, many consumers have lost trust in their service provider and have approached ACCAN for clarification about straight forward matters such as details of their plan or whether broadband is available in their area.

Lack of awareness of the needs of people with disability

There is a disconcerting lack of awareness and empathy in telecommunications customer service for serious conditions. ACCAN has documented a case where a consumer who was forgetful and explained she had a brain tumor was spoken to in an impatient and condescending manner by a customer service representative. Additionally, another consumer who had been sent a special use handset with incorrectly sized buttons was told he could not return it because the packaging had been opened. Although he had mentioned he was going blind and this handset was of no use, the consumer was ignored and the return policy was repeated to him.

Indigenous consumers

Unfortunately it also appears the telecommunications providers are failing to adequately meet the needs of indigenous consumers, particularly in regional and remote areas. We continue to receive advice from financial counsellor case workers that their clients have been sold products that don't work in the areas they are being used and clients are under the impression that the service is "free". Further, clients are not advised of credit management programs to make landline and mobile services more affordable. This contradicts the spirit of the codified rules on credit management.

Young people and debt

ACCAN does not generally receive contact from young people, yet we are conscious that most young people are telecommunications consumers who can experience quite severe problems. In particular, there is rising concerns about the level of mobile phone debt among young people.⁷ We look forward to a discussion with stakeholders about the experience of young people in dealing with telecommunications service providers and the TIO.

The failure at the core of customer service in the telecommunications industry has seen ACCAN put a considerable amount of time and resources into investigating and escalating complaints for the most vulnerable of consumers. This pro-active approach has included writing letters to managers of customer service, follow up phone calls and further research to find answers for consumers. It is often the case that once our organisation's name is mentioned, solutions to problems are readily presented. This demonstrates that there is capacity for prompt problem solving in the customer service division. However, Indigenous consumers, people with disabilities, consumers from non-English speaking backgrounds and other consumers are not receiving the same level of care or priority from customer service representatives.

⁷ See for example Urbis Consulting, *Young People (12-17 years) & Financial Debt*, Report to the National Youth Affairs Research Scheme, 2008

2. Systemic Failures in the Consumer Protection Framework

The Consultation Paper poses a series of questions about the nature and causes of systemic failures in the customer service and complaint handling. ACCAN contends that the root causes of the failings identified in the preceding chapter lie in an ineffective legislative and regulatory framework, market power of the service providers and the failure of responsible institutions to play their role in delivering a fair marketplace. The self-regulatory systems of consumer codes enshrined in the 1997 legislation has resulted in consumer protection instruments (codes) that are largely unenforceable and poorly monitored, giving service providers little incentive to invest in customer service. Institutions like the ACMA and TIO haven't done a good enough job in fixing preventing harm from occurring. The industry has been in a 'race-to-the-bottom' in misleading and unfair industry practices and poor customer service.

2.1 Ineffectiveness of Consumer Codes

Consumer codes that deal with the relationship between service providers and their customers have taken many forms over the years and have ultimately culminated in two main consumer codes: the Telecommunications Consumer Protection Code (TCP Code) and the Mobile Premium Services Code (MPS Code).⁸ The TCP Code deals with customer information on prices, terms and conditions, consumer contracts, billing, credit management, customer transfer and complaint handling and is currently under review. The TCP Code is the primary focus of consideration in the *Consultation Paper*.

A registered code is listed as subordinate legislation, however there is no proactive requirement for parties to comply with any code, even a registered code. In fact the telecommunications industry is not obliged to comply with a code until it is specifically requested to do so by the ACMA through a formal Direction to Comply and even then it generally requires compliance with an aspect of the code rather than the code in its entirety. Since the TCP Code came into operation in May 2008, the following service providers have been issued with Direction to Comply notices: TPG Internet Pty Ltd, Edirect Pty Ltd, iiNet Limited, Soul Telecommunications Pty Ltd, Jason Kenneth McKay (trading as Web Ace), BKB Internet Pty Ltd and EzyCall Pty Ltd.

In 2008/09 the TIO identified 144,255 possible code issues and confirmed 2,537 code breaches.⁹ This represented a 116% increase in possible code issues and a 512% increase in confirmed code breaches. The numbers of confirmed code breaches would likely be much higher if all complaints containing possible code breaches were investigated (they are currently not investigated if the complaint is not escalated). Information about code issues and breaches is provided to the ACMA, the Australian Competition and Consumer Commission (ACCC) and the industry body Communications Alliance every month, quarter and financial year. Amazingly during 2008/09, at a time when confirmed code breaches increased by 512%, the ACMA reported just three directions to comply, one of which was subsequently revoked. Such figures are not unusual.

Under the *Telecommunications Act 1997* (the Act), the ACMA may commence proceedings to impose civil penalties for a failure to comply with a Direction to Comply. Yet civil penalties have never been applied for breaches to the TCP Code. ACCAN believes this failure is in part due to the reluctance of the ACMA to take such action and in part due to the unenforceability of the code in any case. Much of the TCP Code is drafted in such a way that

⁸ ACCAN continues to argue that these two Codes should be combined into a single consumer protection code.

⁹ TIO, 2009, *Annual Report*, p61



proceedings brought by the regulator against a service provider would be very difficult if not impossible to successfully prosecute. By way of example, the TCP Code has included provisions against unfair contract terms in consumer contracts, yet evidence is emerging that large numbers of telecommunications contracts continue to include terms that would be considered unfair. Ironically, with implementation of new national unfair contract laws, we are now seeing telecommunications contracts being targeted as among the worst offenders in unfair terms. In at least this case, the enforcement regime has proven ineffective.

The TCP Code has just two signatories. Hutchison 3G Australia became a signatory to the TCP Code on 17 September 2008 and Singtel Optus became a signatory on 29 March 2010.¹⁰ As a signatory to the code, these two providers are bound by the Communications Alliance Code Administration and Compliance Scheme.

The TCP Code places no obligation on the industry body, Communications Alliance, to monitor complaints, monitor compliance, undertake routine compliance with signatories or identify systemic code issues and breaches. However it does require that Communications Alliance handle complaints about code signatories in accordance with the Communications Alliance Code Administration and Compliance Scheme. The Communications Alliance is required to report on this Scheme including the incidence of signatories' compliance and signatories reporting on compliance to the public via its newsletter and Annual Report. Communications Alliance has not reported publicly on compliance with the TCP Code.

Another notable problem with the TCP Code is how inaccessible it is to consumers. Few consumers know about the existence of the code and fewer still would be able to use the code to assert their rights. The TCP Code is written in dense, inaccessible legalese that privileges the interests of industry over the rights of consumers.

Of the 1,162 carriage service providers registered with the TIO and the 177 carriers licensed in Australia, just two providers are currently signatories to the TCP Code and just 7 providers have been directed to comply with the TCP Code. Optus, a signatory to the Code, has been the subject of ongoing court proceedings brought by the ACCC for misleading and deceptive conduct. Effective regulation demands good enforcement, yet becoming a signatory to a Code means very little and even a Direction to Comply has little meaning given the ACMA's failure to commence serious enforcement actions. There is evidence that the industry is simply not compliant with important rules contained in the TCP Code.

In summary, the TCP Code is a woefully weak tool to protect the interests of consumers in the telecommunications industry. ACCAN is participating in the current review of the TCP Code in good faith – we genuinely want to see an approved code, but we are conscious that the TCP Code review cannot address many of the systemic failures – such as the fact that codes are not mandatory, so few industry participants are signatories, and that there is little incentive for compliance.

Lessons from the development of the MPS Code

The process undertaken in the development of the Mobile Premium Services (MPS) Code exemplifies what is wrong with the current code development process of the Communications Alliance. The MPS Code development process operated in a manner entirely inconsistent with the Communications Alliance Operating Manual. Consumers were quite clearly affected stakeholders in the subject matter of the proposed Code but were not part of the Working Committee from the outset, thus losing the opportunity to have genuine input.

¹⁰ It is unclear if Hutchison's signatory status transferred to Vodafone/Hutchison following the merger of the two providers.



The inadequacies of the MPS Code development process were as follows: Consumer representatives were excluded from the start of the Code development process; one individual was invited to participate and after strenuous objections two representatives were allowed to participate; consumers were only included towards the end of the Code negotiations after much work had been done on the Code and the scope had already been decided; the consumers did not have equal representation on the committee; and the committee was not independently chaired.

When the consumer representatives on the committee raised serious concerns about the lack of adequate community safeguards in the Code, it was nevertheless published without a committee vote in contravention of previous ACIF Operating Manual. The consumer representatives were effectively silenced due to a requirement of confidentiality until the committee was disbanded, which was once again a Communications Alliance Board decision.

After Communications Alliance announced it had submitted the Code to ACMA for registration, an alliance of consumer groups (including the Consumers' Telecommunication Network, the predecessor of ACCAN) announced its opposition to the Code because it did not address a number of basic consumer issues which the working committee had refused to incorporate into the code. Communications Alliance wrote to CTN advising that it had submitted another version of the Code to ACMA incorporating a number of additional clauses – notably CTN were advised after the fact and not given the opportunity to actually agree to examine the code as it was finally submitted, despite being listed as a participant in the code itself.

Whilst the inclusion of consumer protections CTN had strongly argued for throughout previous months was welcomed, it is notable that the consumer representatives were informed after the amendments had been made. They were not given an opportunity to provide input into the drafting of those changes, nor given the opportunity to vote on the revised draft Code.

It is disappointing there has been a decrease in consumer engagement in co-regulatory processes in recent years. We acknowledge that the Communications Alliance has convened a Steering Committee for the current review of the TCP Code that contains equal industry and consumer representation and has an independent chair. However, at the time of writing we are awaiting confirmation that the Steering Committee will accept equal representation on the review working groups. It also remains the case that any proposed new code must still receive the approval of the Communications Alliance Board, which has no consumer representation. We believe that all aspects of reform should be developed and maintained with robust consumer involvement.

2.2 Ineffectiveness of Institutions

Australian Communications and Media Authority

In piecing together the puzzle of why the situation for consumers have become so bad in the telecommunications industry, it is notable that the ACMA has been a relatively quiet presence in the sector. While ACCAN is very pleased to welcome and support the ACMA's *Reconnecting the Customer Inquiry*, we must also observe that this inquiry comes after years of inaction on the effectiveness of consumer codes.

Under s123 of the Act, the ACMA has the power to make an industry standard if an industry is not compliant with a code. Under s125 of the Act, the ACMA can make an industry standard if an industry code fails. According to s125, a code is deemed to be deficient if;

- a) the code is not operating to provide appropriate community safeguards in relation to that matter or those matters; or
- b) the code is not otherwise operating to regulate adequately participants in that section of the industry in relation to that matter or those matters.¹¹

The case for ACMA intervention to create a standard has existed for a long period of time and that the regulator is remiss for not using the powers it has available to improve consumer protections.

ACCAN is also concerned about the quality of the ACMA's enforcement operations. In a comparative study of consumer regulators undertaken by CHOICE, the ACMA's was assessed against a Good Practice Model identifying eight areas of enforcement practice. CHOICE was unable to properly benchmark the ACMA's performance against the other 11 regulators due to a lack of information, but the results of the research are nevertheless useful in understanding the ACMA's enforcement activities. The ACMA recorded the following results: Enforcement power – adequate; Enforcement Policy – adequate; Resources – no rating; Targeting – adequate; Enforcement outcomes – no rating; Transparency – poor to adequate; Consultation – adequate.¹²

The report finds that:

“...in the industries covered by [the ACMA and the Therapeutic Goods Administration] there is a lower level of consumer protection enforcement than in some other areas studied. The problem - as correctly pointed out by both regulators – lies primarily with the model rather than the performance of the regulator per se, although we think that there are areas for improvement even within the sub-optimal framework that has been imposed on them (as there are for all the regulators we reviewed).”¹³

Telecommunications Industry Ombudsman

Another major institution in the telecommunications landscape is the Telecommunications Industry Ombudsman (TIO). ACCAN members continue to have concerns about the TIO structure and the fact that the TIO Board is solely made up of industry representatives. We note that ombudsman schemes in other sectors (most notably the Financial Ombudsman Service) have moved away from this governance model.

ACCAN is also concerned about the scope of TIO activities and in particular its capacity to handle complaints in a rapidly converging market. We note that the Productivity Commission has recommended that the TIO improve its effectiveness by “extending the functions of the TIO to pay television and reviewing options for further consolidation, including through a single consumer entry point for communication services complaints”.¹⁴ ACCAN has commissioned a major piece of research to explore how well-equipped the TIO is to deal with the challenges that lie ahead in the telecommunications landscape for consumers. We would be pleased to share this research with the ACMA when it is available later this year.

Based on the sheer number of complaint numbers, ACCAN believes that internal dispute resolution (IDR) schemes operated by telecommunications providers are inadequate. We believe that the TIO could and should play a much greater role in reducing the incidence of complaints by placing higher requirements on its members, charging more for disputes it

¹¹ *Telecommunications Act 1997*, s125(7)

¹² CHOICE, *Good Practice in Consumer Protection Enforcement: A Review of 12 Australian Regulators*, December 2008, p52-57

¹³ *Ibid*, p3

¹⁴ Productivity Commission, *Review of Australia's Consumer Policy Framework, Inquiry Report*, Volume 2, No.45, 30 April 2008, p209



handles and being more public about complaint numbers and types (for example publishing complaints per thousand customers).

Lastly we note that the ACMA and the Communications Alliance rely almost exclusively on the TIO for data about systemic issues in the industry. ACCAN is not privy to the reports on systemic issues that are delivered to these agencies. We note that the number of confirmed Code breaches reported in the TIO's public data has been rapidly rising and yet we have seen very little action from either the regulator or the industry association. We wonder about the adequacy of information being collected about systemic issues and whether the TIO should be more transparent about the issues it sees in the industry.

2.3 Market failures

Imperfect Information

The term 'confusopoly' is often used to describe the telecommunications market. Satirist Scott Adams created the term to describe a group of companies with similar products who intentionally confuse customers instead of competing on price.¹⁵ The confusopoly is commonly associated with deregulated service and network industries that offer unnecessarily complex products and pricing structures.

ACCAN is frustrated with telecommunications providers who offer products that are extremely difficult, sometimes impossible, to understand. We have documented marketing material that is nearly impossible to decipher the actual deal and/or promises a deal that is scam-like. Product complexity has been associated with weak competition, poor consumer information and the expanded use of agents. Product complexity can also help explain why consent issues remain a persistent feature of the industry. A 2009 study by ACCAN, for example, identified significant concerns regarding consent among indigenous consumers, young people and culturally and linguistically diverse consumers.¹⁶

Mobile phone plans are notoriously difficult to compare, making good decision-making impossible and contributing to consumer dissatisfaction. This is a feature of the market that has, in our view, contributed to poor consumer outcomes. For example, when customers believe their "capped" plan is capped, they are understandably frustrated with their experience of bill-shock and the inability of customer service representatives to do much more than offer to put them on a high "capped" plan.

The problem of asymmetric information is not unique to the telecommunications industry. We note, by way of example, that the Consumers Utility Advocacy Centre (CUAC) has recently commenced a research project exploring complex products and consumer decision-making in the energy industry.

Challenges to consumer sovereignty

ACCAN is also frustrated that telecommunication service providers appear to have forgotten that they are not merely a technology supplier but are, as their name suggests, a *service* provider to the whole community with diverse needs and that they should conceptualise themselves as a *service business*. There appears to have been a significant lack of investment in customer service on the part of providers.

Customers are commonly either locked into a contract for 24 months or due to their geographic location have no choice of provider. It is very difficult for consumers to stimulate competition in this market environment. With so many captive consumers it is essential that

¹⁵ Wikipedia, "Confusopoly" accessed at <http://en.wikipedia.org/wiki/Confusopoly> on 10 September 2010

¹⁶ ACCAN, *Informed Consent: Research Report*, 2009, Quest Publishing Services, Brisbane



the regulator and the industry work together with the community to ensure that consumers truly receive the service that they are paying for.

3. Improving consumer outcomes

From its inception ACCAN has recognised that consumer welfare is best served through vigorous competition in fair and informed markets and where empowered consumers shape supply through the expression of their demand rather than modifying demands to fit whatever is offered. We seek fairness in dealings and swift restitution where things go wrong. We advocate for the necessary tools to support these outcomes.

ACCAN supports strong and effective general consumer protection measures that provide consistent economy-wide protection and remedies for Australian consumers. It is for this reason that we strongly supported the implementation of national unfair contract laws and continue to call for further law reform.¹⁷ However, industry-specific regulation has an important role to play in addressing the unique issues that arise in the context of a competitive, essential service industry. The Productivity Commission explains the need for industry-specific regulations as follows;

“Taking action after the event under generic law may not provide adequate consumer protections where:

- *The risk of consumer detriment is relatively high and/or the detriment suffered if things go wrong is potentially significant or irremediable...*
- *The suitability and quality of services is hard to gauge before or even after purchase”¹⁸*

There are good reasons why telecommunications consumers need additional industry-specific protections. Telecommunications services provide a lifeline to essential emergency services and provide the platform for civic, economic and social participation in all aspects of our lives. Insufficient access to telecommunications services can have disproportionately high impact on one’s quality of life. At the same time, deregulation of the telecommunications industry has seen a confusing array of new products on the market with lengthy contracts and a quality of service that in many cases can be impossible to gauge until the service is taken up. In short, ACCAN is firmly of the view that industry-specific regulations are warranted now and in the future.

3.1 Legislative Framework

The telecommunications industry is regulated under the *Telecommunications Act 1997* (the Act) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSS Act). The consumer protection framework is based on a form of co-regulation, but it is a form of co-regulation that ACCAN believes is fundamentally flawed and has buckled under the pressures of the 21st century telecommunications market. The Act provides the legislative framework for the development and registration of industry codes of conduct on consumer issues, with a regulator in place to monitor codes of conduct and enforce non-compliance.

¹⁷ See for example Asher and Freeman, “A Fairer Australian Consumer Law” in *Trade Practices Law Journal*, Volume 18, June 2010, pp129 - 131

¹⁸ Productivity Commission, *Review of Australia’s Consumer Policy Framework, Inquiry Report*, Volume 2, No.45, 30 April 2008, p83



The Act does not contain a set of consumer protection principles for telecommunications consumers. The result is an exclusive reliance on industry codes of conduct without any guidance on the minimum content or guiding principles of such codes.

Codes have become the dominant form of regulation because the Act indicates a legislative preference for self-regulation. The purpose of the Act (section 3) is to promote the long term interests of end users and the efficiency and international competitiveness of the Australian telecommunications industry. Section 4 of the Act, however, states:

The Parliament intends that telecommunications be regulated in a manner that:

(a) promotes the greatest practicable use of industry self regulation; and

(b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry

but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3

The consequence is that the telecommunications industry and regulators interpret the Act as preferring self-regulation at all costs, without proper consideration of the best policy tools. In the past the ACMA has struggled to decide when it is appropriate to move away from self-regulatory measures.

3.2 Consumer Protection Standards

ACCAN believes the ACMA should use this Inquiry as the impetus for the creation of Consumer Protection Standards that enshrine essential consumer protections as mandatory, enforceable standards. The Minister for Broadband, Communications and the Digital Economy has foreshadowed the introduction of new standard-making powers, which would be developed based on Ministerial direction. The proposed new Consumer Protection Standards would be developed by the regulator “who will need to balance the interests of consumers with those of the industry” and penalties of up to \$250,000 will apply for a breach of the standard.¹⁹ ACCAN supports the introduction and implementation of these powers as soon as possible.

Complaint Handling Standards

The first standards that ACCAN would like to see developed are standards for complaint handling covering internal dispute resolution (IDR) processes, external dispute resolution processes (EDR) and establishing super-complaint powers. A good example to draw on is the Australian Securities and Investments Commission (ASIC) *Regulatory Guidance 139*, which sets out the criteria ASIC uses when assessing whether a financial services sector external dispute resolution scheme meets the benchmarks for customer based dispute resolution schemes and *Regulatory Guidance 165* which sets out minimum requirements for providers’ internal complaints processes. ASIC enforces these obligations through license conditions.

In developing its standards, ASIC takes into account Australian Standard AS ISO 10002-2006 *Customer satisfaction—Guidelines for complaints handling in organizations*. ASIC has conducted research which finds that timely resolution of disputes through IDR processes can be a critical factor in overall satisfaction with complaints handling.²⁰ The guidance ASIC provides ranges from describing the principles that need to be met to prescribing minimum

¹⁹ The Hon. Stephen Conroy, Minister for Broadband, Telecommunications and the Digital Economy, Address to CommsDay Summit 2010, Four Seasons Hotel, Sydney, 20 April 2010

²⁰ See ASIC *Regulatory Guide 165*



requirements such as the definition of a complaint and specifying maximum response timeframes. Perhaps the ultimate power of the guidance is that it deals with the unique industry issues that arise. We believe the same could be achieved in the telecommunications industry.

ASIC’s regulatory guidance for EDR schemes is based on the following guidelines;

Benchmark	Underlying Principle
Accessibility	The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
Independence	The decision-making process and administration of the scheme are independent from scheme members.
Fairness	The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.
Accountability	The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
Efficiency	The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
Effectiveness	The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Table 1: DIST Benchmarks and their underlying principles ²¹

We believe the telecommunications industry would benefit from the application of the same principles in a consumer protection standard. The adoption of these standards would drive changes in the way that consumers are made aware of their right to access IDR and EDR and substantially change the governance structures of the TIO.

Credit and Debt Management Standard

Many problems that ACCAN and our member organisations confront are the limited (or ineffectiveness of) obligations on industry participants to help customers manage lines of credit, avoid unaffordable debt and be treated fairly when presenting with financial hardship. ACCAN believes that customers will benefit from the following measures;

- Disallow the use of the term “cap or “capped” in marketing material unless the product actually has a ceiling on the billed charges at the specified level.
- Customer nominated credit limits on post-paid telecommunications products.
- Email and SMS notification of when a customer has reached 70%, 90% and 100% of included credit limits (for SMS, calls and data)
- Disclosure of actual call costs in marketing material alongside any claims of included value of calls/SMS/data

ACCAN would like to see the incidence of bill-shock dramatically reduced and we believe that measures such as those outlined above would be in the mutual interest of customers

²¹ Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in 1997



and providers. We believe these measures would best be achieved in the form of a standard that is mandatory and enforceable on all providers.

We are also aware that practices in dealing with customer hardship have fallen behind best practice in essential service industries. Measures like hardship protections are best enshrined in mandatory standards rather than being subject to the code-making process.

Super-complaint powers

A super-complaint is a complaint about any feature, or combination of features, of a market for goods or services that harms, or appears to be significantly harming the interests of consumers. This concept originated in the United Kingdom and is enshrined there in law in the *Enterprise Act 2002*. Under this framework, an organisation may be eligible to make a super complaint if it appears to represent the interests of consumers of any description. ACCAN would be such an organisation, as would the TIO and other organisations such as CHOICE and the Australian Telecommunications User Group (ATUG).

Super-complaints should be given fast-track consideration by the ACMA, with an obligation to publish a reasoned response within 90 calendar days from the day after a complaint is received. The ACMA should publish a public response stating what action, if any, it intends to take in response to the complaint. This 90 day period is the maximum time allowed for a response. The published response must also state the reasons for the decision taken.

We believe that there are features of the telecommunications market in Australia which harm significantly the interests of consumers. A super-complaint power would allow consumer representative bodies like ACCAN to bring complaints about such systemic issues. This mechanism would facilitate the resolution of these issues and thus improve overall consumer welfare. As a trial of the model, ACCAN has recently partnered with the Australian Financial Counselling and Credit Reform Association (AFCCRA) and the Australian Council on Social Services (ACOSS) to lodge Australia's first super-complaint to the ACMA.

3.3 Consumer Codes

If self-regulatory consumer codes are to remain a feature of the consumer protection landscape they must be significantly improved. In 2008 the consumer group CHOICE and research group Galexia undertook a comparative analysis of the code making processes across various industries in its research report *Consumer Protection in the Communications Industry: Moving to best practice*. CHOICE and Galexia found that there were the following basic threshold requirements for effective co-regulation:

- Co-regulation requires the close integration of legislation and codes of conduct;
- Legislation should contain at least basic consumer protection principles and guidance;
- Codes of conduct may enhance existing legislative consumer safeguards or provide more detailed industry guidance on compliance, but should not weaken existing consumer protections;
- Codes of conduct should deliver real, enforceable outcomes;
- Codes of conduct should be developed through comprehensive stakeholder consultation;
- Subject to the nature and purpose of the particular code, codes of conduct should generally apply to all industry participants and not just those that sign up; industry members should be encouraged to communicate the existence of codes to which they are subject to their customers;
- Codes of conduct should be subject to effective, transparent compliance monitoring

- There is a trend towards independent, innovative compliance monitoring and the publication of compliance reports; and
- Codes of conduct should be subject to regular independent review.²²

The telecommunications industry's consumer code process fails on every point listed above.

Debates about the essential prerequisites for self-regulatory codes are not new. Nearly a decade ago the Howard Government commissioned an inquiry into Self Regulation in Consumer Industries. At the time the Australian Securities and Investments Commission (ASIC) was considering how reforms in the financial services sector would be complemented with self-regulatory tools. The Deputy Chair of ASIC offered this observation on the two key points about self-regulation:

“The first is that for self-regulation to be effective, it needs to be properly integrated into the overall regulatory framework – that is, it needs to dovetail with the law and the regulator's policies – not repeating or confusing requirements, but assisting and possibly extending them in some areas....

The second, related, point is that self-regulation must have vigorous and active accountability mechanisms. The old-style model for self-regulation of "set and forget" is not viable going forward. If accountability is not in place, then the risk is not just that self-regulation will be ineffective, but that it may be harmful as industry and regulators devote resources elsewhere on the assumption that self-regulation is working. If this occurs, the existence of self-regulation would be counter-productive.”²³

The telecommunications code process appears to have suffered from many of the failings identified above. The consumer codes have, in fact, contributed to consumer harm because they have merely maintained a facade of protection. The ACMA has generally adopted a wait-and-see approach to a fundamentally flawed regulatory regime which has ultimately compromised consumer welfare.

Learning from the financial services sector

The most mature consumer protection framework can be found in the financial services industry. Codes of conduct are not specifically required by law but notably the banking industry has taken pains to develop an industry code that extends the industry beyond their minimum legal obligations and expresses a new standard of customer care. There is significant integration of the legislation, the regulator, industry self-regulation and external dispute resolution.

ASIC has a general monitoring function for all codes and has the option of approving codes under s1101A of the *Corporations Act 2001*. ASIC's *Regulatory Guide 183* sets out a number of *threshold* criteria for the approval of industry codes:

“RG 183.5 We believe that the primary role of a financial services sector code is to raise standards and to complement the legislative requirements that already set out how product issuers and licensed firms (and their representatives) deal with consumers. We expect an effective code to do at least one of the following:

- (a) address specific industry issues and consumer problems not covered by legislation;*

²² *Consumer Protection in the Telecommunications Industry: Moving to best practice*, Prepared by Galexia for CHOICE, October 2008, p17

²³ An address by Jillian Segal, Deputy Chair of the Australian Securities and Investments Commission, to the National Institute for Governance Twilight Seminar, *Institutional self-regulation: what should be the role of the regulator?* Canberra, 8 November 2001



- (b) *elaborate upon legislation to deliver additional benefits to consumers; and/or*
- (c) *clarify what needs to be done from the perspective of a particular industry or practice or product to comply with legislation.”²⁴*

Once these threshold criteria have been passed, the regulatory guide then sets out a series of more detailed criteria for a code’s approval. ASIC states that a code must:

- Be freestanding and written in plain English;
- Incorporate a comprehensive body of rules (not a single issue guideline);
- Be enforceable against subscribers;
- Be developed in a consultative way with key stakeholders;
- Be effectively and independently administered;
- Be adequately promoted;
- Have monitored and enforced compliance;
- Contain appropriate remedies and sanctions; and
- Be subject to a mandatory review every three years.²⁵

A key principle is that codes of conduct can provide further enhancement or elaboration of basic consumer protections contained in legislation, but they cannot weaken them. The financial services industry demonstrates that with the right legal and regulatory framework, self-regulatory codes can make a valuable contribution to the fair, effective and sustainable operation of markets.

A new Telecommunications Consumer Protection Code

ACCAN believes the TCP Code would be improved if it provides strong incentives for industry participants to:

- establish appropriate incentives for complaint reduction
- establish basic high-level standards for customer care
- ensure accessible, swift, fair and transparent complaint handling procedures
- deliver fair and timely resolution of complaints
- provide consumers with information about supplier performance
- increase awareness of EDR schemes where complaints cannot be resolved
- extend obligations on industry beyond those mandated in new mandatory consumer standards

Improved content needs to be complemented by major improvements in code language and style. Despite containing a significant proportion of the consumer protections in the telecommunications industry, the TCP Code remains inaccessible to consumers. It is a highly complex, overly long and ponderous document. Consumers cannot easily ascertain what their rights are and how their provider has agreed to engage with them. Very few people are aware of the TCP Code and fewer people could actually use it effectively to help frame their complaint. ACCAN has argued that a key work item for the TCP Code review needs to be a plain language code developed to inform consumers of their rights and responsibilities akin to the *Code of Banking Practice*.

We strongly believe there needs to be a test for enforceability and compliance against operative clauses of the Code. Many code rules currently have the effect of allowing suppliers to justify their actions rather than reflect an underlying principle of consumer

²⁴ ASIC, *Regulatory Guide 183 - Approval of financial services sector codes of conduct*, Issued 23/02/2005 Amended 4/03/2005, p3

²⁵ ASIC, *About Industry codes of practice*, webpage available at <http://www.fido.gov.au/fido/fido.nsf/byheadline/About+the+industry+codes+of+practice> accessed 10 September 2010



protection. The code should explain how providers must engage with their customers, without the myriad exemptions that currently riddle the code. For example instead of carving out numerous examples of when a supplier doesn't need to give a customer information, the key principle needs to be that suppliers must undertake all efforts to provide any information requested by a customer.

There are examples in the Code of provisions that are unenforceable because there are no requirements to substantiate them. As a result, providers implement variable processes that may not be compliant with the intention of the code. In this review, we'd like the underlying rules to be tested to ensure that they can be implemented, monitored and enforced.

A major ongoing problem of the TCP Code has been a lack of public reporting on compliance and systemic monitoring for compliance. An existing TCP Code rule (9.1.8) requires identification of systemic problems and prevention of recurrence, and yet the TIO complaint statistics indicate repeated breaches of code clauses. Even then, the TIO is not an appropriate way to gauge the level of compliance with Code rules, because they require an individual to make a complaint, approach the provider for resolution, and then finally go to the TIO as a last resort.

This data cannot capture the number of consumers impacted by rules that are not complied with. We note that by way of example, that the Telephone Information Service Standards Council monitors the 190 industry for compliance with the code of practice. This ensures that services remain compliant with the code, and consumer complaints as a result are negligible.

An active and ongoing monitoring regime is critical to ensuring a rules based code is workable. It may be necessary for the ACMA to assume this role in the initial years of a consumer code.

ACCAN is advocating that the TCP Code adopt a principles-based approach to its content. Principles-based regulation is focused on desired outcomes rather than prescriptive rules. We believe the Steering Committee of the TCP Code review should outline the desired consumer outcome and then enshrine those outcomes in principles and outcome-focused rules in the Code. At its highest level, our principles-based approach is about treating customers fairly. We hope TCP Code review offers the opportunity to create a Code that provides clear guidance for providers about how they will treat their customers fairly. ACCAN has commissioned the Communications Law Centre of the University of Technology, Sydney to explore how principles-based regulation could assist the regulation of the telecommunications industry. We would be very pleased to share this research with the ACMA when it is available later this year.

3.4 Performance Reporting

Many other essential service industries use a system of mandatory performance reporting to encourage high levels of customer service. ACCAN is in favour of introducing a performance reporting scheme in the telecommunications industry. We propose that such a scheme should require quarterly reporting of data published by the ACMA against specified criteria, with a regular audit of service providers.

Performance Reporting in the Electricity Industry

The Ministerial Council on Energy is currently in the process of developing a national framework for regulation of the energy retail market. Under the framework the Australian Energy Regulator (AER) will take the main role in regulation of energy retailers. One of the AER's functions under the proposed framework is the administration of a national



performance regime, including the development of AER Performance Reporting Procedures and Guidelines and national hardship program indicators specifying the information and data that regulated entities must report to the AER. Ultimately the reporting framework will measure the extent to which retailers meet their customer service objectives and the effectiveness of these activities. The national reporting framework is drawing heavily from the state-based performance reporting frameworks that have operated successfully over a long period of time.

The energy industry's performance indicators cover a range of customer service and complaint indicators. The Queensland Council of Social Services (QCOSS) has undertaken a major study in the performance indicators that should apply in the sector and concludes that the following pieces of information and performance should be reported by energy retailers;

- Customer numbers (disaggregated into categories), details of customer churn rates
- Engagement with third parties and the community
- Handling of customer in payment difficulties (amount of debt, number of late notices, late fees, disconnection warning), use of payment plans
- Disconnections and reconnections
- Concessions applied to accounts
- Security Deposits held
- Use of pre-payment meters
- Customer service criteria²⁶

As an example, some of the performance criteria that could be usefully adopted in the telecommunications industry include:

Adapted from Queensland Council of Social Services (QCOSS) submission to the AER Issues Paper on Retail Market Performance Reporting

Debt (for residential customers not in a retailer hardship program)

Number of customers repaying an energy debt
Average amount of energy debt
Number of customers with energy debt > \$500
Number of customers with energy debt > \$1,000
Number of customers with energy debt > \$3,000

Billing and notice path (for residential customers)

Number of bills issued and number of bills paid by the due date
Number of payment extensions given
Number of late payment fees charged and number paid
Number of reminder notices sent out
Number of disconnection warning notices sent out
Number of customers on a shortened collection cycle
Number of customers using a flexible payment arrangement
Number of customers using Centrepay
Number of customers where the flexible payment arrangement was terminated by the retailer as a result of non-payment

Customer Service (call centre)

For all customer categories combined; collect monthly and report quarterly
Number of calls to operator
Number and % of calls to operator answered within 30 seconds

²⁶ Queensland Council of Social Services (QCOSS) Submission to the AER Issues Paper on Retail Market Performance Reporting

Average time before an operator answers the call
 Number and % of calls abandoned before answered by operator
 Use of the interpreter service for customers from a non-English speaking background
 Use of a TTY (text telephone) or use of the National Relay Service

Performance reporting by the regulator is a long standing feature of the energy sector and is well regarded by industry participants and consumer and community stakeholders. In the financial services area, the Reserve bank publishes critical consumer information such as the aggregate level of banking fees across product types, which has been invaluable in maintaining public pressure on banks to keep fees fair.

We encourage the ACMA to use this Inquiry to identify a set of performance indicators that will hold the industry to account for its level and effectiveness of customer service and complaint handling. We also recommend an ongoing process of developing performance indicators against consumer protection standards such as those outlined earlier in this submission.

3.5 Enforcement

The use of Codes, Standards and Performance Reporting to drive better outcomes for telecommunications consumers all rely on meaningful enforcement from the responsible regulators. ACCAN is concerned that the ACMA is not well set up to execute best practice in enforcement. We are also concerned that the ACCC could and should be doing more to drive better practices in the sector using the enforcement tools it has available.

The ACCC has recently been given a suite of new enforcement tools including:

- civil pecuniary penalties – which will allow the ACCC to seek proportionate responses to breaches and enable us to more effectively promote compliance with the law;
- disqualification orders – that will restrict individuals from managing corporations where the Court is satisfied those individuals should be prevented from such roles, and for example, may apply where they have involved in repeated instances of TPA misconduct;
- substantiation notices that can be issued to businesses by the ACCC to verify claims made about their products or services;
- infringement notices – in relation to particular consumer protection provisions of the TPA;
- public warning powers – that may be particularly useful in of the area of product safety or scam activity; and
- greater ability for the ACCC to obtain redress for consumers.²⁷

We would like to see the ACMA have the same suite of enforcement tools available to enforce consumer standards and consumer codes. In the event that this is not possible, we believe it is time to consider whether the ACCC is best placed to enforce compliance with standards and codes in the telecommunications industry.

However, it is not sufficient to simply have enforcement tools at the regulators disposal. There needs to be a clear commitment from regulators to use them, meaning a preparedness to take strong action against non-compliant industry participants.

²⁷ Speech to Small Business Breakfast, *The Australian Consumer Law – what it means for small business in the NT*, Peter Kell, Deputy Chairman, 25 May 2010, Darwin



It is another frustration to ACCAN that the ACCC has allowed advertising standards to severely decline. We have raised concerns about the excessive use of indecipherable small-print in print, internet and television advertisements. We are also concerned about the excessive use of exclusions from offers that are the main subject of the advertisement. The ACCC should be taking a much stronger line to bring about advertising that serves the interests of consumers. While we welcomed last year's s87B undertaking signed with Telstra, Optus and Vodafone/Hutchison, we believe it is time for the ACCC to step up with more enforcement action to stamp out our unfair marketing practices.

3.6 Consumer Compensation

ACCAN is in favour of expanding the Customer Service Guarantee (CSG) to deliver compensation to consumers for breaches of basic customer service standards. This may simply be a compensation payment for the provider not doing what they said they would do, failing to respond to a complaint within a specified period of time or a material billing error. The expanded compensation arrangements should derive from obligations placed on service providers under mandatory consumer protection standards and codes. ACCAN believes that this would provide an additional impetus to comply. It would also reasonably compensate consumers for the time and resources that they put into asserting their rights in the marketplace. We would welcome a conversation with the ACMA about the suite of compensation payments that could be accommodated under the current CSG or a new compensation framework.

Conclusion

The consumer protection framework for telecommunications is an odd beast. Its reliance on industry codes sets it apart from other essential service industries that combine code-making processes with legislative requirements and mandatory standards set by an independent regulator (in many cases enhanced by industry codes). The telecommunications consumer protection framework is also different from other industries because of its widespread failure to prevent consumer harm and its failure to provide effective remedies where harm is suffered.

In this submission ACCAN has demonstrated the systemic failures of regulation and of institutions (as they currently operate) to ensure best practice minimum customer service levels. We also point to the persistent market failures that make it difficult for consumers to make good decisions.

ACCAN is in favour of a multi-pronged approach to reforms, incorporating new Consumer Protection Standards as well as a performance reporting scheme and new compensation payments to consumers for breaches of standards. We also acknowledge that consumer codes can remain a feature of the regulatory landscape but only if they are significantly improved, and not as a substitute for the new measures we have identified.

ACCAN wants to see the root causes of complaints identified and addressed so that issues don't arise in the first instance. Ultimately we want to work with industry, government and regulators to make the telecommunications market work for consumers.