



Women  
With  
Disabilities  
Australia  
(WWDA)

# **Women With Disabilities Australia (WWDA)**

**Submission to the Consumer Related Industry  
Code Processes Issues Paper**

**May 2009**

*The term "self-regulation" is viewed by many, including the [Australian Competition and Consumer] Commission, with great circumspection. It is very subjective, meaning all things to all people including, for some, the facade and not the reality of addressing consumer concerns.*

— Graeme Samuel, Centre for Corporate Public Affairs Oration, 2003



*Winner, National Human Rights Award 2001*

*Winner, National Violence Prevention Award 1999*

*Winner, Tasmanian Women's Safety Award 2008*

*Certificate of Merit, Australian Crime & Violence Prevention Awards 2008*

*Nominee, French Republic's Human Rights Prize 2003*

*Nominee, UN Millennium Peace Prize for Women 2000*

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## Executive Summary

WWDA welcomes the opportunity to provide comments on the Issues Paper on the Consumer Related Industry Code processes.

In the views of WWDA these processes are:

- too subjective;
- not fair to, or meaningful for consumers;
- create a façade of industry accommodation of consumer issues, yet
- fail to address consumer concerns.

The Consumer Communication Rights of the Australian community should include:

1. Right to access neutral networks
2. Right to access digital media and information
3. Right to secure networks and services
4. Right to privacy and data protection
5. Right to software interoperability
6. Right to barrier free access and equality
7. Right to pluralistic media

WWDA considers that the development of the Australian Consumer Law will strengthen and improve ACMA's ability to bring about greater code compliance. The national approach to eliminating unfair contract terms should improve the general consumer experience.

The recommendations of the Australian Government Inquiry into the Telecommunications Regulatory Regime<sup>1</sup> and of the *Consumer Driven Communications: Strategies for Better Representation*<sup>2</sup> should all be re-considered in the context of this review.

WWDA recommends that the *Telecommunications Act 1997* be amended such that consumer participation in code development be mandatory and must be demonstrated before ACMA can register any co- or self-regulatory code.

### 1. Determining the need for a code

*Question 1.1: In what circumstances is a consumer-related industry code the most appropriate form of regulation?*

Consumer Related Industry Codes are appropriate for all issues relating to the delivery of services to individual and small business end-users. They are also appropriate in codes relating to the supply of equipment and delineating network parameters, where the needs of end users with disabilities could be compromised, e.g. specifications for Voice over Internet Protocol (VoIP) services and the supply of equipment to support assistive technologies.

From a consumer viewpoint, the voluntarily developed consumer-related codes do not deliver greater transparency of the communications industry. Generally, consumers are not aware that there is self regulation or how it operates, or of the name and nature of any consumer codes. Their perception of industry is formed by their experiences as end-users – and it is a negative one of poor customer relations, lack of real competition, a deliberately constructed 'confusopoly' of products and services, confusing contract terms, lack of information and an inability to have problems resolved at the point of first contact.

Despite the shortcomings of the current process, WWDA continues to believe that a co-regulatory code development process coupled with a strong compliance programme can deliver good outcomes for consumers. However, it also believes that the lead roles in the co-

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<sup>1</sup> [http://www.archive.dcita.gov.au/2008/february/2005-2006\\_annual\\_report/section\\_4\\_appendices/parliamentary\\_committees](http://www.archive.dcita.gov.au/2008/february/2005-2006_annual_report/section_4_appendices/parliamentary_committees)

<sup>2</sup> Consumer Driven Communications Group, *Consumer Driven Communications: Strategies for Better Representation Final Report*, December 2004, accessed online 13/5/09 at: <http://www.acma.gov.au/webwr/lib283/final%20report%201.pdf>.

regulatory process needs to be relocated with the Australian Communications Consumer Action Network, working in tandem with ACMA.

*Question 1.2: Who should have input into the decision to develop or review a consumer-related industry code?*

Consumer Related Industry Codes should be developed in response to:

- an issue identified and substantiated by a consumer organisation;
- a consumer issue identified by the high level of complaints to the TIO or ACMA or the DBCDE;
- a policy or legislative change affecting consumers; or
- information received from the Minister for Broadband, Communications and the Digital Economy.

The decision on whether to proceed to develop a consumer code should rest with consumers and the regulator. Funding for code development would have to come from ACMA drawn from all monies collected from fees (i.e. not only carrier licence fees).

Representatives of all relevant stakeholders should have input to the code development process. The triggers which would precipitate a review and subsequent revision could be written into each new code. The timeframes for the process could be set accordingly, with 6 months as a guide for average length of the process.

## **2. Participants in the code drafting process**

*Question 2.1: Who should be involved in the drafting process, and what form should their participation take?*

ACMA should convene and fund a standing Consumer Code Standing Committee, with a member from each of the ACMA and ACCC, with 2 industry representatives and 4 consumer representatives, at least two of which are appointed by ACCAN. Importantly the ACMA Consumer Code Standing Committee should have an independent chairperson. Consultation with other stakeholders and a wide range of consumer would be included in the process.

Consumer members would be appointed for 3 years, and remunerated for their participation with annual fixed stipend, supplemented on an hourly rate according to the number of sitting hours required for development or review of a specific code. Completion of ACCAN conducted training would be an eligibility requirement for application for Standing Committee membership.

A flowchart of suggested amended process is included at Appendix A.

## **3. Timing**

*Question 3.1: What is an appropriate time frame for the development of new consumer-related industry codes?*

Current delays in code development are brought about when there is conflict of outcome needs between consumers and industry. WWDA proposes that a 1-month period be allowed for the decision to proceed, followed by a 6-month period allowed for code development, thence followed by a 1-month public feedback stage, and ended by a further lapse of one month for registration of the code, making a 9-month total, followed by a 12-month moratorium like implementation phase.

*Question 3.2: Are there ways to streamline industry code development processes, including legal drafting processes?*

WWDA believes that the legality of code wording and content should be incorporated during the development phase. This would be achieved by having a legal representative as ex-officio member of the Standing Committee or ensuring that one of the appointed consumer representatives also had expertise in this area. An incentive system for achieving the

timeframe outlined under Question 3.1. is needed. Where there is an impasse the independent chair should have the deciding vote.

*Question 3.3: Should registered consumer-related industry codes be easily amended if required? How might this be achieved in a more timely way whilst achieving appropriate consensus?*

The trigger for a code review/revision could be set as the total number of complaints received by a number of bodies including the ACCC, ACMA, TIO, and DBCDE. The complaints counted should be those from individuals and small business which have been unable to be resolved by direct contact with the supplier. ACMA would have the power to revoke the licence of a SP which consistently breached a code, and to impose a significant parole period during which re-application for the licence could not be made.

#### **4. How should the costs of code development be met?**

*Question 4.1: Who should be responsible for paying for the costs of consumer-related industry code development?*

The payment of the costs of code development should remain with ACMA but be funded from the collection of licence fees from all stakeholders as per Part 110 of the Telecommunications Act 1997, including VoIP Service Providers.

*Question 4.2: On what basis should any reimbursement be made?*

Consumer members of the Consumer Code Standing Committee would be appointed for 3 years, and remunerated for their participation with annual fee supplemented on an hourly rate according to the number of sitting hours required for development or review of a specific code. Industry members could also be appointed for 3 years with an incentive system of licence reduction considerations used to encourage industry to put forward a candidate as a representative on the CCSC, and by making a public celebration of the registration of a code where the timeframe for development was met, and acknowledging the SPs involved in the process.

#### **5. Consultation on draft codes**

*Question 5.1: How should broader community, industry and government consultation on draft consumer-related industry codes, or codes undergoing review, be undertaken?*

ACCAN should establish a Consumer Code Development Interest Database. Membership of the database would not be dependent on membership of ACCAN. This database should automatically generate email alerts when a code consultation phase is under way. This would operate in a similar way to the automatic email notices sent out by those registered with the AHRC for updates, or with the office of the Minister for DBCDE for media releases. Industry SPs could also subscribe to the Consumer Code Development Interest Database for a nominal annual fee. Importantly, those complainants whose complaints were a part of the trigger for the code development or revision should also be contacted by whichever organisation logged the initial complaint. Making widespread contact in this way would minimise the need for expensive public face-to-face consultations. However, consideration would have to be given to reaching people who do not have access to the internet.

*Question 5.2: Should submissions and comments made on a draft consumer-related industry code be made publicly available (subject to considerations of potentially defamatory or commercial-in-confidence material)?*

Yes.

No participant in the process should be able to hide behind any non publication clause in the expression of their reasons for amendment or otherwise to a code.

## 6. Code monitoring, compliance and enforcement

*Question 6.1: What is the most effective way to monitor compliance with consumer-related industry codes?*

The disjunction between the development of industry codes and their registration by ACMA introduces a major dysfunction into the process. The accompanying industry audits conducted by ACMA do not seem to be effective in achieving exemplary industry behaviour. The ACMA 5-category reactive approach to compliance seems extremely lenient from a consumer perspective, and does not indicate where or what type of consequence there may be for persistent or flagrant non-compliance. CA monitoring of compliance of code signatories requires scant input because there are virtually no signatories. This is an untenable situation and a major failing of the self regulatory process.

The introduction of a national consumer law coupled with a scheme for public recognition of consistent high levels of compliance and consideration of the use of a compliance mark. SPs need to give telephone and front-of-house staff a higher degree of autonomy to resolve complaints than is currently the case. In tandem with this, ACMA needs to strengthen its code monitoring activities.

*Question 6.2: How should compliance be enforced and what, if any, additional enforcement options or powers would assist the regulator to enforce compliance?*

Code compliance needs to be enforced through the timely application of fines for code breaches.

*Question 6.3: Should industry have to report publicly on its own compliance with consumer-related industry codes?*

Yes.

The self monitoring requirement for industry needs to be put in place, and reported annually. These reports would go to ACMA and be supplemented by an ACMA annual report which could then give a summary industry compliance overview. Treating the incidence of complaints as confidential enables industry to hide poor performance levels.

## 7. General Comments

WWDA is concerned that the 'public interest balance' test currently in place is extremely subjective because it compares industry business interests against the number of consumers likely to benefit. This affects small groups of consumers, such as the Deaf who have specific requirements which need to be met under human rights considerations.

At present, CA is not sufficiently representative of industry to have carriage of the self- or co-regulatory process. However, ACMA enforcement levels need to be increased, only \$12,000 in fines was collected during 07-08, a small amount in a \$38 billion industry.

## 8. Conclusion

The consumer related code development process is not currently working at optimal levels because the self regulatory regime enables consumer issues to be relegated to second or third level considerations. This lack of will on the part of industry to regulate has been coupled by a lack of enforcement by ACMA of those codes which are registered.

The process of code development needs to be put into the hands of the regulator, with mandated high levels of input from consumers, and independent decision making in circumstances of contention. In addition, the code monitoring system needs to be tightened with additional complaint reporting required by SPs, greater transparency of complaint reporting.

## About Women With Disabilities Australia (WWDA)

Women With Disabilities Australia (WWDA) is the peak organisation for women with all types of disabilities in Australia. WWDA is run by women with disabilities, for women with disabilities. It is the only organisation of its kind in Australia and one of only a very small number internationally in that it operates as a national disability organisation; a national women's organisation; and a national human rights organisation. WWDA represents more than 2 million disabled women in Australia. WWDA is inclusive and does not discriminate against any disability. The aim of WWDA is to be a national voice for the needs and rights of women with disabilities and a national force to improve the lives and life chances of women with disabilities. WWDA addresses disability within a social model, which identifies the barriers and restrictions facing women with disabilities as the focus for reform. More information about WWDA can be found at the organisation's extensive website at: [www.wwda.org.au](http://www.wwda.org.au)

### Introduction

The view expressed by Graeme Samuel in his 2003 Oration to the Centre for Corporate Public Affairs is quoted in the frontispiece to this submission because it summarises the shortcomings of the current Consumer Related Industry Code processes. In the views of WWDA these processes are:

- too subjective;
- not fair to, or meaningful for consumers;
- create a façade of industry accommodation of consumer issues, yet
- fail to address consumer concerns.

This is not the intended outcome of the self regulatory processes set up in Section 6 of the *Telecommunications Act 1997* (TA). Nor was it the intention under the 2005 merger of the Australia Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) into the Australian Communications and Media Authority (ACMA) to lessen responsibility for consumer concerns.

Indeed, ACMA's vision<sup>3</sup> is:

"to be known as an integrated, forward-looking, proactive and flexible organisation that is recognised as a leading communications regulator that supports and encourages an innovative and vibrant communications sector."

WWDA believes that many of the requirements for the achievement of this vision are already in place, but are not being acted upon.

WWDA further endorses ACMA's stated strategic intent<sup>4</sup>:

"to enable the communications needs of the Australian community to be met by supporting and encouraging an innovative and vibrant communications sector"

but does not believe that it is currently being realized.

WWDA welcomes the opportunity to provide comments on the Issues Paper on the Consumer Related Industry Code processes.

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<sup>3</sup> ACMA Annual Report 07-08

<sup>4</sup> (ibid)

## WWDA's observation on current Consumer Related Industry Code processes

The Consumer Rights of the Australian community should be as set out in the Consumer Telecommunication Network's (CTN's) Charter of Communication Rights<sup>5</sup>. Internationally, consumer communication rights are aptly summarised in the Trans-Atlantic Consumer Dialogue (TACD)<sup>6</sup>:

1. Right to access neutral networks
2. Right to access digital media and information
3. Right to secure networks and services
4. Right to privacy and data protection
5. Right to software interoperability
6. Right to barrier free access and equality
7. Right to pluralistic media

In fact the achievement of consumers' vision and that of ACMA are similar.

Although a number of studies and reports published over the past decade have made recommendations for improvement to the Consumer Related Industry Code processes, there have been insufficient changes.

However, recent initiatives for the Department of Broadband, Communications and the Digital Economy (DBCDE) in communications instill optimism in the WWDA Telecommunications Group. For example, the initiative of an investigation into International Mobile Roaming Charges<sup>7</sup> demonstrates that an area of consumer concern can be addressed in a timely manner, and can take into account international modes of operation. WWDA believes that ACNMA can undertake similar pro-active initiatives to safeguard consumer interests. There are other important lessons not directly related to code development which should be noted from the International Mobile Roaming Charges investigation<sup>8</sup>.

The ACMA enforcement provisions<sup>9</sup> which were enacted in 2006, provide the Authority with improved tools for a converged communications environment, especially in giving ACMA jurisprudence over content providers involved in the supply of Mobile Premium Services. The new legislation gives ACMA enforcement powers to pursue civil penalty orders in the Federal Court and a raft of other powers<sup>10</sup>. WWDA believes that this legislation sets a scenario for stronger enforcement powers overall. Strengthening of ACMA's enforcement powers will help to bring about positive cultural change in the industry.

WWDA considers that the development of the Australian Consumer Law will also strengthen and improve ACMA's ability to bring about greater code compliance. The national approach to eliminating unfair contract terms should improve the general consumer experience as noted in

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<sup>5</sup> <http://www.ctn.org.au/admin/ktmlpro/files/uploads/2007%20Conference%20-%20Newton.pdf>

<sup>6</sup> [http://www.tacd.org/index.php?option=com\\_docman&task=doc\\_download&gid=43&Itemid=40](http://www.tacd.org/index.php?option=com_docman&task=doc_download&gid=43&Itemid=40)

<sup>7</sup> Department of Broadband, Communications and the Digital Economy, *Report of findings on: International Mobile Roaming Charges, June 2008*, KPMG 2008

<sup>8</sup> Lessons to learn from the International Roaming study:

- i. product price matching by comparing data from different carrier websites is time consuming, complex and predicated on a consumer having access to the internet. This is the current situation when people with disabilities are trying to compare information between manufacturers on accessibility features of communications equipment.
- ii. non-standard presentation of data (carrier websites display multiple time and billing unit combinations, different flag fall options and loyalty bonuses and a host of peak and off-peak time and volume based discounting choices) contributes significantly to complexity for consumer and especially those with disabilities,
- iii. frequency of changing of plans makes it impossible for consumers to make informed choices, and
- iv. there are no standardized pricing units to enable comparison of costs between carriers.

<sup>9</sup> *Communications Legislation Amendment (Enforcement Powers) Act 2006*

<sup>10</sup> The additional powers include: (i) issuing of remedial directions in certain circumstances; (ii) applications of enforceable undertakings for certain matters; (iii) ability to seek injunctions to ensure that an unacceptable media diversity situation does not arise; (iv) ability to issue infringement notices for certain contraventions.

comments on the inquiry into these law reforms<sup>11</sup>. However, WWDA further considers that there are currently sufficient legal mechanisms in place to enable regulatory improvements to be made in the Consumer Related Industry Code processes even before the National Consumer Law Reforms are in place.

Demonstration of ACMA's low level of enforcement can be found in its Annual Report for 2007-08. In this report, Outcome 1 states that ACMA will provide a regulatory environment which supports an efficient communications sector<sup>12</sup>. However, ACMA undertook a total of only 97 Level 1 Preliminary Actions by way of code compliance in 2007 (ibid. p38). Only 2 of these actions proceeded to issuing a Level 5 Formal Direction. This low level of code compliance actions is at odds with the TIO's escalating level of consumer complaints where it reported over 66,000 potential code issues<sup>13</sup> in its Annual Report for the same year.

Similarly ACMA audits of manufacturers and importer (suppliers) resulted in only 2 infringement notices being issued. This seems astonishing when the volume of imports of mobile phones alone is around 9 million items per year, with 2.8 million imported in the first 4 months of 2009<sup>14</sup>.

The initiative of the Minister for Broadband, The Hon. Senator Stephen Conroy, to set up a new consumer body and the subsequent support of the DBCDE in its initial development mean that a mechanism exists to support all industry and regulator endeavours to improve Consumer Related Industry Code processes.

As already noted there are a number of studies into the regulatory regime, and a number of recommendations made for change. The Australian Government Inquiry into the Telecommunications Regulatory Regime<sup>15</sup> is important in this regard, and made a number of important recommendations which should be reconsidered in the context of this review. For example, Recommendation 32 recommended the insertion of a new section of the Telecommunications Act 1997 (TA) for annual reporting of compliance, and monitoring of the accuracy of the data by ACMA. Moreover the Government Inquiry importantly recommended that the recommendations of the *Consumer Driven Communications: Strategies for Better Representation*<sup>16</sup> be adopted.

These recommendations need to be carefully reconsidered in the context of this review. This report recommended that the TA be amended such that consumer participation in code development be mandatory and must be demonstrated before [ACMA] can register any co-regulatory code (not confined to those produced by the [Communications Alliance (CA)]).

WWDA endorses the spirit of all the self regulation protocols set out in its Recommendation 7, but will strengthen some of them further in addressing the questions set out in this issues paper. Recommendation 7 states:

- public forums to be held at the outset to inform all stakeholders including consumers, suppliers and regulators of issues and objectives;
- strict timeframe for completion of public comment draft and final registration copy;
- **equal representation of consumer and supplier representatives** on the code development working committee;
- representatives from the [ACMA], the ACCC and the Telecommunications Industry Ombudsman (TIO) on code development committees;

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<sup>11</sup> Lawyers Weekly (April 16 2009), accessed online 12/05/09 at: <http://www.lawyersweekly.com.au/blogs/opinion/archive/2009/04/16/consumer-law-reforms-change-is-on-its-way.aspx>

<sup>12</sup> ACMA Annual Report 2007-2008 p.10

<sup>13</sup> [http://www.tio.com.au/publications/annual\\_reports/ar2008/annual\\_2008\\_34.html](http://www.tio.com.au/publications/annual_reports/ar2008/annual_2008_34.html) (figures for 2006-2007)

<sup>14</sup> <http://www.amta.org.au/?Page=184>

<sup>15</sup> [http://www.archive.dcita.gov.au/2008/february/2005-2006\\_annual\\_report/section\\_4\\_appendices/parliamentary\\_committees](http://www.archive.dcita.gov.au/2008/february/2005-2006_annual_report/section_4_appendices/parliamentary_committees)

<sup>16</sup> Consumer Driven Communications Group, *Consumer Driven Communications: Strategies for Better Representation Final Report*, December 2004, accessed online 13/5/09 at: <http://www.acma.gov.au/webwr/lib283/final%20report%201.pdf>.

- independent chair (not a supplier or consumer representative);
- independent professional draftsman;
- provision of daily sitting fee, transport and accommodation costs for consumer representatives;
- resources for consumer representatives to liaise with each other during the code development via teleconferencing;
- assistance for consumer representatives to consult with wider constituencies;
- a forum held before public comment to ensure broader consumer input summarising issues; and
- forum to be held prior to completion of the public comments to ensure all the submissions have been properly considered before the ballot draft is finalised.

A current failing in industry is that Recommendation 39 of this report was ignored. This recommendation stated that the Consumer and Disability Councils of the Communications Alliance should have parallel status to its Board, with all new consumer codes, guidelines and changes to existing codes and guidelines needing to be approved by these councils before going to the Board. That this did not happen contributed to progressive disenfranchisement of all consumers, substantially locked the Councils out of the Consumer Related Industry Code processes, and has culminated in the Councils being dissolved prior to ACCAN being fully operational.

## **Issues that have been raised with current processes**

### **What should consumer-related industry code processes involve in order to achieve more effective, efficient and responsive protections for consumers?**

#### **1. Determining the need for a code**

*Question 1.1: In what circumstances is a consumer-related industry code the most appropriate form of regulation?*

Consumer Related Industry Codes are appropriate for all issues relating to the delivery of services to individual and small business end-users, e.g. billing, contracts, prices terms and conditions (as included in the Telecommunications Consumer Protection Code [TCP]). They are also appropriate in Codes relating to the supply of equipment and delineating network parameters, where the needs of end users with disabilities could be compromised, e.g. specifications for Voice over Internet Protocol (VoIP) services and the supply of equipment to support assistive technologies.

Communications Alliance (CA), as the main industry body, places higher importance on those codes which are not consumer related industry codes. Codes developed by the Network References Panel, the Operations Panel, and [some developed by] the Customer Equipment and Cable Reference Panel of CA are regarded as being the enabling mechanisms for operations, and therefore having a direct affect on the capacity of an individual carrier or carriage service provider (CSP) to deliver profits for shareholders. The culture which supports this discrepancy may have arisen because the physical attributes of networks and systems can be objectively measured, whereas the quality of customer service delivered to end-users is a subjective entity. To date, the culture of the communications industry is such that consumer issues are not accorded a high level of endorsement or acceptance. Since communications are an essential service, end users have no option but to engage with telecommunications companies, and are thus in a situation open to less than optimal service and even exploitation.

The outcome of these diametrically opposed industry attitudes is manifested in escalating levels of complaints from consumers to the TIO, and general low-standing of the industry in the eyes of consumers. Culture change to place higher value on consumer related issues will need to be driven by leadership from the Australian Communications and Media Authority

(ACMA), the Australian Communications Consumer Actions Network (ACCAN), the Department of Broadband, Communications and the Digital Economy (DBCDE) and government politicians.

From a consumer viewpoint, the voluntarily developed consumer-related codes do not deliver greater transparency of the communications industry. Generally, consumers are not aware that there is self regulation or how it operates, or of the name and nature of any consumer codes. Their perception of industry is formed by their experiences as end users – and it is a negative one of poor customer relations, lack of real competition, a deliberately constructed ‘confusopoly’ of products and services, confusing contract terms, lack of information and an inability to have problems resolved at the point of first contact.

Thus self regulation with consumer codes is not delivering good outcomes for consumers or promoting consumer confidence. Investor confidence is not dependent on the nature of, or compliance with consumer codes. In fact it can be directly at odds with what would make good consumer outcomes. The imperative to maximise profits in the brave new competitive market, can be directly opposed to consumer needs.

Furthermore, the self regulatory environment is not delivering an ability to deal with change at a faster rate than legislative change. The passage of bills through parliament can be at least as rapid as the time taken to develop a consumer code. Consumer consultation is a well established parliamentary practice, and the committee system can deliver in-depth consultation with stakeholders. Despite this, WWDA continues to believe that a co-regulatory code development process can deliver good outcomes for consumers.

Efficient, timely and robust monitoring of consumer codes, with the swift imposition of fines, is needed before the codes can be an effective means of regulation of industry. Compliance with codes should be mandatory and therefore would not confer any competitive marketing advantage. Adherence to code articles would then deliver better outcomes for consumers.

If the self regulatory system operated with consumers having equally weighted input to code development, all licenced operators were required to be cognisant of the code and signatories to it, and ACMA was able to take swift action on reported breaches, then cooperative code development could be undertaken.

However, industry recalcitrance and the ACMA unresponsiveness of its 5-stage deliberative processes means that the current system is not working. The development of consumer codes needs to be taken out of the hands of CommsAlliance, and managed by ACMA in conjunction with the Australian Communications Consumer Action Network (ACCAN) with industry invited to have equal numbers of representatives on the code development body. The resultant code would have to be binding on industry, and monitored by ACMA.

*Question 1.2: Who should have input into the decision to develop or review a consumer-related industry code?*

Consumer Related Industry Codes should be developed in response to:

- an issue identified and substantiated by a consumer organisation;
- a consumer issue identified by the high level of complaints to the TIO or ACMA or the DBCDE;
- a policy or legislative change affecting consumers; or
- information received from the Minister for Broadband, Communications and the Digital Economy.

The decision on whether to proceed to develop a consumer code should rest with consumers and the regulator. Consumer concerns as outlined above should be brought to ACMA and ACCAN. An objective mechanism for deciding when and how to proceed should be developed. This would include what threshold of complaint levels was needed as a trigger. The TIO, ACCC and an industry body should be consulted during this process, with the ultimate decision on whether to proceed being the joint responsibility of ACMA and ACCAN. Funding for code

development would have to come from ACMA drawn from all monies collected from fees (i.e. not only carrier licence fees).

Representatives of all relevant stakeholders should have input to the code development process. Those involved from industry may vary according to the proposed content of the code. Once approved, the strict monitoring of the code would be the responsibility of ACMA. Compliance by all stakeholders which undertake operations covered in the code should be mandatory. There should be an ability to widen the involvement of stakeholders if need arises during the code development process or to consult with relevant experts as needed. As far as possible, codes should be technology neutral so that scope creep is minimised.

The triggers which would precipitate a review and subsequent revision could be written into each new code, and would vary from code to code according to the content and nature of each one. The timeframes for the process could be set accordingly, with 6 months as a guide for average length of the process. ACMA and ACCAN would have joint responsibility for the decision to proceed to the review and revision process.

Assessing the need for a code can be done by using the incidence of incoming complaints as a guide. However, relying on this method exclusively will mean that some needs for consumer codes will be overlooked because they relate to network issues. Relying on complaints data alone as the trigger will skew considerations to situations where consumers register their unfair treatment because it has resulted in monetary loss. This method will also mean that code development is always reactive rather than pro-active.

## **2. Participants in the code drafting process**

*Question 2.1: Who should be involved in the drafting process, and what form should their participation take?*

ACMA should convene a standing Consumer Code Standing Committee, with a member from each of the ACMA and ACCC, with 2 industry representatives and 4 consumer representatives, at least two of which are appointed by ACCAN. Importantly the ACMA Consumer Code Standing Committee should have an independent chairperson. A representative from each of the Telecommunications Industry Ombudsman (TIO) and the Australian Human Rights Commission (AHRC) could be involved at the first draft feedback stage of development. A legal representative may also be an ex-officio member in order to give guidance on legal requirements, and correct terminology/wording of a code. However, this representative should have no voting rights. In most circumstances one of the criteria for the appointment of consumer representatives could be to have legal expertise so that this person could then assume the legal representative role.

Participation on the Consumer Code Standing Committee should be funded by ACMA. Consumer members would be appointed for 3 years, and remunerated for their participation with annual fixed stipend. This should be supplemented on an hourly rate according to the number of sitting hours required for development or review of a specific code. The hourly rate should be determined at a level commensurate with the public service salary equivalent to the work to be done, or at a fixed, pre-determined APS level. It has been proposed that a fair hourly rate can be calculated by taking the full time salary of an equivalent position and dividing by 1000<sup>17</sup>.

Making training available to general consumers so that they are equipped to apply to be representatives on the Consumer Code Standing Committee will be essential. It could be that a criterion for application for membership of the Consumer Code Standing Committee is the completion of a training module conducted by ACCAN. Consumer advocates have intimate and extensive knowledge of the issues of concern to their constituents, and a perspective on requirements of those whom they represent. However, consumer advocates do not necessarily

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<sup>17</sup> Online Connections: Consulting and Support accessed online (14.5.09) at: <http://www.onlineconnections.com.au/consulting.html>

have knowledge of the relevant telecommunications legislation, do not know about guides for code development, nor understand the constraints to operation which affect the ACMA, CA, ARHC, ACCC, TIO, TISSC etc.; or have a historical perspective on the formation of these bodies.

A flowchart of suggested amended process is included at Appendix A.

### 3. Timing

*Question 3.1: What is an appropriate time frame for the development of new consumer-related industry codes?*

Current delays in code development are brought about when there is conflict of outcome needs between consumers and industry. Because industry has an imperative to maximise profit to shareholders, and to minimise the cost or effort of implementation, it can be unwilling to allow content which is considered to give particular rights to consumers. This inevitably prolongs the code development process. All Consumer Code Standing Committee members do need time to consult with constituents, whether in industry or the community, and this requires a finite time for feedback. WWDA proposes that a 1-month period be allowed for the decision to proceed, followed by a 6-month period allowed for code development, thence followed by a 1-month public feedback stage, and ended by a further lapse of one month for registration of the code. The total time allowed for code development would be 9 months. An implementation phase of agreed length (e.g. 12 months) should be fixed during which time industry makes necessary adjustments, although monitoring would commence during this time. This 12 month period would act as a moratorium for industry, at the end of which, breaches of the code should be prosecuted by ACMA.

*Question 3.2: Are there ways to streamline industry code development processes, including legal drafting processes?*

WWDA believes that the legality of code wording and content should be incorporated during the development phase. This would be achieved by having a legal representative as ex-officio member of the Standing Committee or ensuring that one of the appointed consumer representatives also had expertise in this area.

Consideration should be given to developing an incentive system for achieving the timeframe outlined under Question 3.1. Since current delays are brought about by the inability of the Working Committee members to reach agreement, a mechanism for resolving stalemates must be part of the process. In circumstances where the Consumer Code Standing Committee is unable to resolve an impasse, the independent chair should have the deciding vote.

*Question 3.3: Should registered consumer-related industry codes be easily amended if required? How might this be achieved in a more timely way whilst achieving appropriate consensus?*

The trigger for a code review/revision could be set as the total number of complaints received by a number of bodies including the ACCC, ACMA, TIO, and DBCDE. It would be similar to the trigger of number of complaints used to commence code development, e.g. set at a certain percentage of the original threshold. The complaints counted should be those from individuals and small business which have been unable to be resolved by direct contact with the supplier. The complaint statistics could comprise formal complaints lodged with the TIO, and informal complaints logged by the ACCC, ACMA, and DBCDE. The complaints statistics should be reported to both ACMA and ACCAN on a quarterly basis, and should also be publicly available, but de-identified as to individual service providers (SPs) involved.

Once an agreed threshold number of complaints have been received from these bodies, ACMA should convene the Consumer Code Standing Committee, and commence a review/revision process. There would then greater onus on industry to minimise the number of unresolved

complaints. Consumers would thus have greater, although indirect power. Mechanisms might need to be put in place to enable an industry body (such as CA) to name and shame a carrier or CSP which contributed a significant number of complaints. This would mean that the recalcitrant SP would have negative publicity, and that compliant SPs could be thus be actively involved in minimising the likelihood of the revision process. However, WWDA realises the inherent difficulty of requiring cooperative operation of competitive entities.

As a subsequent step, ACMA would have the power to revoke the licence of a SP which consistently breached a code, and to impose a significant parole period during which re-application for the licence could not be made. This should act as a strong encouragement for compliance.

These mechanisms should minimise the need for revision in cases where the Consumer Code Standing Committee believes that the code itself is sound. Where there are consumer concerns about the ongoing validity of the code content, then either ACMA or ACCAN could a joint meeting to decide on the reconvening of the Consumer Code Standing Committee. The Standing Committee would then have one month to decide whether or not to proceed. This would give all committee members time to consult with constituents.

#### 4. How should the costs of code development be met?

*Question 4.1: Who should be responsible for paying for the costs of consumer-related industry code development?*

The payment of the costs of code development should remain with ACMA but be funded from the collection of licence fees from all stakeholders as per Part 110 of the Telecommunications Act 1997. The stakeholders which contribute would therefore be:

- (a) carriers;
- (b) service providers;
- (c) carriage service providers;
- (d) carriage service providers who supply standard telephone services;
- (e) carriage service providers who supply public mobile telecommunications services;
- (f) content service providers;
- (g) persons who perform cabling work (within the meaning of Division 9 of Part 21);
- (h) persons who manufacture or import customer equipment or customer cabling;
- (i) electronic messaging service providers.

To this list should be added VoIP Service Providers.

*Question 4.2: On what basis should any reimbursement be made?*

As outlined under Question 2.1, consumer members of the Consumer Code Standing Committee would be appointed for 3 years, and remunerated for their participation with annual fee supplemented on an hourly rate according to the number of sitting hours required for development or review of a specific code. [Funding for the cost of reimbursement for consumer input should not be restricted to those who are **NOT** recipients of s593 grants under the TA.]

Industry members could also be appointed for 3 years. An incentive system to encourage industry to put forward a candidate as a representative on the CCSC would be in the form of a reduction in licence fees. A decision would have to be made as to whether this would be a percentage reduction – which would be equally attractive to all SPs, but potentially reduce ACMA income significantly; or a flat fee discount - which would more attractive to smaller SPs. Further incentive could be built in by making a public celebration of the registration of a code where the timeframe for development was met, and acknowledging the SPs involved in the process.

## 5. Consultation on draft codes

*Question 5.1: How should broader community, industry and government consultation on draft consumer-related industry codes, or codes undergoing review, be undertaken?*

ACCAN should establish a Consumer Code Development Interest Database. Membership of the database would not be dependent on membership of ACCAN. This database should automatically generate email alerts when a code consultation phase is under way. This would operate in a similar way to the automatic email notices sent out by those registered with the AHRC for updates, or with the office of the Minister for DBCDE for media releases. In this way all interested parties could receive the information simultaneously. Notices could also go to the association for community newspapers so that information would automatically appear in print, the network of Radio Print Handicapped, and community television stations so that audible information would be distributed. Industry SPs could also subscribe to the Consumer Code Development Interest Database for a nominal annual fee.

Importantly, those complainants whose complaints were a part of the trigger for the code development or revision should also be contacted by whichever organisation logged the initial complaint. Privacy considerations would mean that permission to re-contact in this way would need to be part of the logging process.

Making widespread contact in this way would minimise the need for expensive public face-to-face consultations. However, consideration would have to be given to reaching people who do not have access to the internet.

*Question 5.2: Should submissions and comments made on a draft consumer-related industry code be made publicly available (subject to considerations of potentially defamatory or commercial-in-confidence material)?*

Yes.

No participant in the process should be able to hide behind any non publication clause in the expression of their reasons for amendment or otherwise to a code.

## 6. Code monitoring, compliance and enforcement

*Question 6.1: What is the most effective way to monitor compliance with consumer-related industry codes?*

The disjunction between the development of industry codes and their registration by ACMA introduces a major dysfunction into the process. The logic of the current compliance regime is reminiscent of an Alice-in-Wonderland conundrum. Compliance with a *registered* code is voluntary until such time as a party breaches the code, whereupon ACMA issues a directive to comply, and compliance becomes mandatory. The accompanying industry audits conducted by ACMA do not seem to be effective in achieving exemplary industry behaviour.

The situation is even less stringent with *unregistered* codes. These are akin to guidelines only, and have little effect on the behaviour of industry SPs. In contrast, at a supposedly higher level of regulation, the mandatory requirement to comply with *industry standards* is excellent. Unfortunately for those in the disability sector the revision process for industry standards is itself flawed. The standard AS/ACIF S040 is minimalist as demonstrated by the recent CA review/revision process which was swallowed up into a research project so that the opportunity to meet consumer claims for additional features has been indefinitely delayed if not obliterated.

This paper does not discuss industry guidelines which have also been developed by CA in a process which mimics that of Code development. They sit lower in the self-regulatory hierarchy than unregistered codes. For example the guideline G586:2006 "*Disability Matters: Access to*

*Communication Technologies for People with Disabilities and Older Australians*” was developed by CA Disability Council in a vacuum. Most members of the Disability Council members work in a voluntary capacity to draft such guidelines. Yet once published there is no obligation on industry to use the guideline in any way. This especially applies to guidelines which are not linked as operational guides to a specific code. Since industry parties devote little or no time to training of staff, the document gathers ‘virtual’ dust on the CA website. It does not seem to serve in any way to increase industry understanding of people with disabilities; to improve the communications sector experience for people with disabilities; or to reduce the number of complaints from people with disabilities to the TIO.

The ACMA 5-category reactive approach to compliance seems extremely lenient from a consumer perspective, and does not indicate where or what type of consequence there may be for persistent or flagrant non-compliance. In practice this approach does not seem to be delivering development of a compliance culture. Recourse to pursuing procedures in Civil law should deliver a wide range of penalties and a more stringent environment.

For the CA, the monitoring of compliance of code signatories requires scant input. A review of the most recent Signatory Status report available on its website<sup>18</sup> is in Table 1.

Table 1: Status of Signatories to selected Communications Alliance Industry Codes

Code Short Name	Signatories to superseded codes (total signatories over several iterations of Code)	Signatories to current code	On ACMA Register
Information on Accessibility Features for Telephone Equipment (C625:2005)	N/A	0	Yes
Priority Assistance (C609:2007)	2	0	Yes
Local Number Portability (C540:1999)	2	0	No
Mobile Number Portability (C570:2005)	8	4	Yes
Handling of life threatening & unwelcome calls (C525:1999)	11	0	Yes
Calling Number Display (C522:2001)	9	0	Yes
Telecommunications Consumer Protections (TCP) (C628:2007)	N/A	1 (Hutchison 3G Australia)	Yes
Superseded Consumer Codes			
Prices, Terms & Conditions	15	See TCP	N/A
Credit Management	14	See TCP	N/A
Billing	13	See TCP	N/A
Customer transfer	9	See TCP	N/A
Complaints Handling	16	See TCP	N/A
Consumer Contracts	1 (Hutchison 3G Australia)	See TCP	N/A

Thus the Telecommunications Consumer Protections Code has attracted one signatory since 2007; the Mobile Number Portability Code has 4 signatories. The Information Accessibility Code (regarded as crucial for people with disabilities to make appropriate purchase choices) does not have a single signatory. The Code Compliance checklists by which CA might check compliance are not rigorous, and the report on their analysis is only available on request by

<sup>18</sup> [http://www.commsalliance.com.au/data/page/3195/Code\\_Status\\_Report\\_300908.pdf](http://www.commsalliance.com.au/data/page/3195/Code_Status_Report_300908.pdf) accessed on 12.5.09

financial members of CA. From a consumer point of view, there is no transparency of compliance status for unregistered codes.

It should be noted that the Mobile Premium Services Industry Scheme (and accompanying guideline) does not appear on this table. The Mobile Premium Services Code (C637:2009) is currently awaiting ACMA approval and hence does not appear either. CA maintains a separate webpage where MPS information can be viewed, and the 19SMS website it developed does form a useful tool for consumers. The contentious process undertaken for the development of the *bona fide* Code and Guideline is illustrative of the shortcomings of current processes. It has been lengthy, costly, in contravention of published code development guidelines, and unresponsive to consumer recommendations.

The introduction of a national consumer law would improve the situation markedly. What is needed is: comprehensive compliance monitoring regime, significant monetary consequences of breaches, naming/shaming of non-compliance. This should be coupled with a scheme for public recognition of consistent high levels of compliance. It is indicative of the industry culture that several years ago CA considered the introduction of a 'compliance mark' for parties which achieved a high level of compliance with codes. The scheme was abandoned. The low level of sign-up to codes may have made it irrelevant. However, in a more robust code compliance environment this could become a feature of competitive advantage. The concept needs to be reconsidered by both ACMA. WWDA recommends that an incentive scheme which recognises high levels of compliance should be instigated by ACMA.

The self regulatory component of compliance reporting should consist of each industry SP undertaking to self monitor its compliance with all published consumer codes on an annual basis, with a compliance report published as part of its annual report. This self monitoring would include logging the incidence of consumer complaints received by its telephone-answering and front-of-house staff. It should also be a requirement to log the number of complaints which were not resolved by telephone and front-of-house staff, i.e. Level 2 complaints. Fulfillment of this requirement would mean that these staff would have to have a higher degree of training and a higher degree of autonomy to resolve complaints than is currently the case. This is a more stringent requirement than that outlined in Section 9.1.1. of the TCP code.

WWDA argues that the administrative burden that these requirements would impose should be an additional incentive for improvement of customer service standards. The nature of self regulation is such that ACMA would have to undertake random, unannounced spot audits of the annual report statistics.

In tandem with this, ACMA needs to strengthen its code monitoring activities, with a tightening of the time frames for rectification of breaches of compliance and a clearly defined pathway for imposing fines for code breaches which are not rectified within the defined and finite timeframes. WWDA believes that it would be too costly to set up a separate code monitoring body.

*Question 6.2: How should compliance be enforced and what, if any, additional enforcement options or powers would assist the regulator to enforce compliance?*

Code compliance needs to be enforced through the timely application of fines for code breaches. The poor customer service reputation of the industry is coupled by a disregard for improvement by many SPs. A consequence of the rapid growth in licence approval, has been accompanied by an increase in competition, a decrease in profit margins, and a disincentive to improve customer service. In the years from 1996 to 2007, a government philosophy of reliance on competition as a self regulatory mechanism in the sector resulted in a communications environment which has not served consumers. Various studies and reports have documented the consumer code development process shortcomings and have made recommendations for improvements. The current issues paper on Consumer Related Industry Code Development Process has referenced a number of these reports. This review provides

WWDA with a welcome opportunity to reiterate the need for strengthening of the ACMA code compliance mechanisms.

*Question 6.3: Should industry have to report publicly on its own compliance with consumer-related industry codes?*

Yes.

The self monitoring requirement suggested under Question 6.1, carries an obligation for industry parties to publish compliance and complaint statistics in their annual reports. This is an extension of the requirement to capture complaints information as already noted in the TCP Code. These reports would go to ACMA and be supplemented by ACMA annual report which could then give a summary industry compliance overview.

Treating the incidence of complaints as confidential enables industry to hide poor performance levels. This prevents consumers from making informed decisions as to the reliability of individual SPs, and of their record with customer service and customer relations. As outlined under Question 6.1., there should be annual awards/recognition for SPs which met certain compliance levels and reduce the level of customer complaints which were not resolved at the point of first contact. Naturally data should be presented both in gross form, and as percentage of revenue size of the company. The 'size' of revenue used could be the publicly available information on which licence fees are charged.

## 7. General Comments

WWDA is concerned that the 'public interest balance' test currently in place is extremely subjective because it compares industry business interests against the number of consumers likely to benefit. For consumer codes which affect the disability sector the 'number of consumers likely to benefit' may be extremely small, but the affect of the code may be to make a profound difference to the lives of that same small group. So public interest cannot be balanced by numbers alone.

The current lack of necessity to be a signatory to a code, means that members of CA do not have to really know of the code content, breaches may happen inadvertently (or as a deliberate action to maximise profits). Because the process for correction of breaches is so prolonged, it means that such breaches may be rectified by a particular SP more or less on a paragraph by paragraph basis, rather than there being a requirement for a SP to consider the code as a whole entity.

Becoming a signatory is, at the very least, an indication of awareness of the code's contents, and a signalling of an intention to honour it. It is disappointing that SPs regard this action as irrelevant. However, it is only a first step. This action is analogous to becoming a signatory to a United Nations convention, whereby signing merely acknowledges that the State Party is aware of the adoption of the convention by the UN and does not commit the signatory party to any action. Signalling this intention would be a good first step for SPs in regard to consumer codes. The real acceptance of a convention comes when a State Party ratifies, and by doing this signals agreement to strictly abide by the convention's contents. Thus the present lack of requirement of members to even become signatories demonstrates a lack of commitment to the self regulatory process.

CA has limited numbers of industry members (less than 100) ranging from law and accounting firms, to VoIP providers, equipment suppliers, mobile carriers, CSPs and major carriers. In addition it has a number of individual members<sup>19</sup>. It is not representative enough of industry to have the responsibility of code development. In contrast there are 268 Carrier Licences to 30 April 2009<sup>20</sup>, and ACMA, as the licence collector, has information about the full range of stakeholders.

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<sup>19</sup> <http://www.commsalliance.com.au/membership/Members>

<sup>20</sup> [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_311589](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311589)

However, ACMA generated only \$12,000 in fines during 07-08, including late payment penalties, spam fines and radio communications non compliance fees. This amount does not seem to constitute a disincentive in an industry which generated \$38 billion in revenue in the 12 months to June 2008<sup>21</sup>. ACMA itself generated \$666 million in industry levies and resource taxes, plus \$42 million in 'cost recovery' charges of which only \$37 million was the actual carrier licence fee.

## 8. Conclusion

WWDA reiterates its thanks for the opportunity to contribute to examination of the Consumer Related Industry Code processes. A flowchart of suggested amended process is included at Appendix A.

The consumer related code development process is not currently working at optimal levels because the self regulatory regime enables consumer issues to be relegated to second or third level considerations. This lack of will on the part of industry to regulate has been coupled by a lack of enforcement by ACMA of those codes which are registered. In addition, the development of codes has been done without reasonable consumer input, so that consideration of consumer issues has been overlooked or ignored. The result is that customer service is non-existent or of poor quality, that consumers' ability to get fair treatment is low. The lack of autonomy of staff working at first point of contact means that complaints cannot be resolved at this level. Consumers are weary of their treatment by service providers and are increasingly taking their dissatisfaction in formal complaints to the TIO, and in informal notifications to ACMA and DBCDE.

The process of code development needs to be put into the hands of the regulator, with mandated high levels of input from consumers, and independent decision making in circumstances of contention. In addition, the code monitoring system needs to be tightened with additional complaint reporting required by SPs, greater transparency of complaint reporting. Finite times for rectifying breaches need to be accompanied by specific penalties for failure to rectify within specified time frames. Licence cancellation with a lock-out period during which re-application cannot be made should be one of the disincentives for persistent non-compliance. These punitive measures need to be balanced by incentives for industry SPs to meet the requirements of a code, and public recognition of SPs which have high levels of compliance, and to those SPs which have contributed to a successful code development or revision process.

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<sup>21</sup> Australia Telecoms Industry Statistics and Forecasts, Executive Summary accessed 12.5.09 at: <http://www.bharatbook.com/detail.asp?id=25387>

APPENDIX A – Proposed Consumer Related Industry Code Development Processes

