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From: mcosgrave6@gmail.com <mcosgrave6@gmail.com>
Sent: Monday, January 15, 2024 9:15 PM
To: Office of the Chair <OfficeoftheChair@acma.gov.au>
Cc: Craig Riviere <Craig.Riviere@acma.gov.au>
Subject: Telecommunications Consumer Protections Code - Submission on the package of materials submitted by Communications Alliance on 14 December 2023

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Good evening,

Please find a submission and covering letter in relation to the above subject matter.

Please acknowledge receipt in due course.

Regards,

Michael Cosgrave
Independent Adviser
0416 043 160

15 January 2024

Ms Nerida O'Loughlin PSM
Chair and Agency Head
Australian Communications and Media Authority

By email: OfficeoftheChair@acma.gov.au

cc: Craig Riviere
Executive Manager, Telecommunications Safeguards
Australian Communications and Media Authority

By email: craig.riviere@acma.gov.au

Dear Nerida,

Telecommunications Consumer Protections Code – Submission on the package of materials submitted by Communications Alliance on 14 December 2023

As you are aware, I was appointed by Communications Alliance(CA) in June 2023 to act as an Independent Adviser on the Telecommunications Consumer Protections(TCP) Code revision.

My principal role is to monitor and provide advice on the TCP Code revision process to verify whether it is fair, reasonable and appropriately transparent. I have been undertaking that task since my appointment.

The principal deliverables for the role also contemplated a written report to the ACMA at the time that the Code is submitted to the ACMA for consideration for registration, to include comments about the adequacy of the consultation process, including the manner in which the final drafting addresses key issues identified during the process.

A revised Draft Code for consideration for registration by the ACMA has yet to be submitted.

The revision process in the second half of 2023 has been driven the request by the ACMA on 5 July 2023 that CA provide by 15 December 2023 definitive and agreed views from CA and its members on the changes it would make to the TCP Code to address areas of concern identified in the ACMA's position paper on consumer expectations for telecommunication safeguards. The ACMA also sought draft revised proposed code provisions to give confidence to the regulator of the effectiveness of CA's approach.

CA submitted a package of materials in response to the ACMA's request on 14 December 2023.

Whilst not specifically contemplated by my Terms of Reference, I have attached a short submission addressing whether the Code revision process to date has been fair, reasonable, and appropriately transparent. In my view it has. It has also sought to be

responsive to the ACMA's expectation that CA and its members move quickly in the improvement of TCP protections. Those views on CA's process could be seen as indicative of a willingness on the part of industry to respond urgently and positively to the ACMA's July 2023 request.

Given there remains a need for further drafting in the event the revision process continues, and drafting is not therefore final, this submission does not seek to address the manner in which the final drafting addresses key issues identified during the process.

It is not clear what process the ACMA intends to follow in evaluating whether CA's agreed positions and draft proposals constitute sufficient progress at this stage of the TCP Code redevelopment to defer the initiation of other regulatory processes. If the ACMA undertakes a public consultation process to inform that decision, this document should be treated as a public submission.

I am contactable on 0416 043 160 or at mcosgrave6@gmail.com.

Yours sincerely,

Michael Cosgrave

Independent Adviser

INDEPENDENT ADVISER ON THE TELECOMMUNICATIONS CONSUMER PROTECTION CODE

SUBMISSION TO THE AUSTRALIAN COMMUNICATION AND MEDIA AUTHORITY

JANUARY 2024

1. This is a submission to the Australian Communications and Media Authority (ACMA) in my role as Independent Adviser to Communications Alliance (CA). My role since my appointment in June 2023 has been to provide independent assessment to ensure that the process for CA's development of a revised Telecommunications Consumer Protection Code (TCP Code) is fair, reasonable, and appropriately transparent. Consistent with that role, this submission addresses the adequacy of the process undertaken by CA in arriving at the agreed industry positions and draft revised and new Code provisions on 14 December 2023. It does not seek to address the substance of those positions and provisions, other than where decisions on the prioritisation of positions have influenced the overall process.
2. I held senior managerial roles in communications and infrastructure regulation at the Australian Competition and Consumer Commission between 1996 and 2021. I have had extensive experience with regulatory process under a variety of different regulatory regimes, including propose/respond models analogous to Part VI of the Telecommunications Act (the Act) where a proposal by a regulated entity or sector is subject to approval or rejection by the regulator.
3. Prior to my appointment, CA had developed and released a process different from that undertaken for previous iterations of Code redevelopment. As I understand it, the revised process sought to address frustration from all stakeholders at previous inefficiencies in the drafting of previous iterations of the Code.
4. The revised process incorporated steps that would be seen as consistent with good consultative practice, including release of a discussion paper, the identification and publication of key issues, extensive bilateral stakeholder engagement to understand individual concerns and a Review Committee mechanism to provide high level guidance and feedback to CA and its members involved in drafting the proposed revised Code.
5. The process builds on the mandatory consultation required by Section 117 of the Act and envisaged the submission of a revised Code by mid-2024. In my view, it provided a robust consultative framework.
6. The framework has required modification due to issues with involvement and timeframes. The intended extensive bilateral engagement with stakeholders was initially complicated by the withdrawal of a number of consumer organisations other than the Australian Communications Consumer Action Network (ACCAN) from the process. That was sought to be addressed, appropriately in my views by incorporating the views of those organisations from past review processes into the summary of key issues.

7. The shape of CA's Code redevelopment task more fundamentally changed with the request by the ACMA on 5 July 2023 that CA provide by 15 December 2023 definitive and agreed views from CA and its members on the changes it would make to the TCP Code to address areas of concern identified in the ACMA's position paper on consumer expectations for telecommunication safeguards. The ACMA also sought draft revised proposed code provisions to give confidence to the regulator of the effectiveness of CA's approach.
8. The ACMA's accelerated timeframe has proved challenging, principally for CA and its members, but also for ACCAN with its own membership consultative processes and the ACCC and TIO, each with their own decision-making governance frameworks.
9. Self-evidently there have been necessary trade-offs between the accelerated timeframe and outcomes required by the ACMA and the consultative process envisaged in the original Discussion Paper. These trade-offs have led to reductions in the depth of bilateral engagement with stakeholders and in the periods provided for feedback to industry and other Review Committee participants, particularly in relation to the CA's position papers. The position papers were circulated 11 days before the most recent meeting of the Review Committee in which they were considered. Written submissions from the Review Committee were sought 2 days after the meeting. This could be contrasted with the 30-day mandatory statutory consultation for a draft Code, but it is difficult to see how such an extended consultation period could have been accommodated whilst still meeting the 15 December deadline.
10. Nonetheless in my view whilst not ideal because of these trade-offs, the process undertaken to this stage of the Code revision has overall been fair and reasonable. As set out below CA have put in place measures to ensure that their processes are transparent to all stakeholders. Additionally, their process has allowed for public participation, has treated all participants equitably, and included measures to explain how CA and its members have understood and addressed divergent positions.
11. The process followed is accurately set out in some detail in a document that is an addendum to the covering correspondence to the package provided by CA to the ACMA on 14 December. Whilst the ACMA will presumably principally examine the substance of the agreed positions and draft provisions in its evaluation of progress to date, the revision of the process, particularly in relation to the meeting frequency of CA's drafting Committee could be seen as indicative of a willingness to respond urgently and positively to the ACMA's July 2023 request.
12. Given the truncated timeframes, the Review Committee took a central role in the provision of advice and feedback to the Drafting Committee. As well as industry members, ACCAN, the TIO, ACMA, DIRTRC and the ACCC were all represented at senior levels on the Review Committee and most of these organisations actively participated in its discussions. As is clear from the Agreed Position Papers, the feedback and advice of these organisations on the adequacy of proposed measures were influential but not determinative of the package provided to the ACMA by CA. Indeed, it is clear that a number of stakeholder suggestions have not been taken up. Where a stakeholder's view has not been adopted, CA's reasoning has been provided in accordance with good process.

13. Some advice and feedback from the Review Committee has only crystallised relatively late in the process to date. This in my experience is not uncommon in multi-faceted consultative processes. The obvious example is in relation to new protections in relation to selling practices. The position paper put to the most recent Review Committee meeting contained a range of additional protections but was subject to strong criticism that the protections overly focussed on correcting information asymmetries with the provision of information at point of sale and did not sufficiently address sales incentives. The Agreed Position Paper provided to the ACMA on responsible selling includes a commitment to protections to address this issue. The protection will certainly require further development and the need for such a protection should probably have been recognised earlier in the development of the position papers. Nonetheless, it does suggest that there is a continued willingness to be responsive to issues as they are better understood.
14. It is highly unlikely that there will be unanimity of views on the sufficiency of the progress made to date, or the appropriateness of the agreed positions and draft provisions. A fair and reasonable process does not guarantee universal satisfaction with outcomes. This may well particularly be the case where the outcomes here sought by the ACMA whilst looking for substantial progress are intermediate ones, that is they do not on my reading require the submission of a full draft Code, which in my view would not have been feasible within the allowed timeframe in any case.
15. There is one additional issue on which I seek to comment. The process to seek to reach definitive and agreed CA views has also been made more complicated by the concurrent development of the Financial Hardship Standard by the ACMA as required by the Ministerial Direction of 6 September 2023. Financial Hardship was one of the concerns originally identified by the ACMA, and there are overlaps between a finalised Standard and any prospective Code. Those overlaps are both of general application such as the scope of the Code and of specific issues and drafting, particularly in relation to credit management. The ACMA has released a draft Standard for comment. CA and others have provided comments seeking amendment of the Draft Code. In my view, it would not be reasonable to require a final definitive and agreed position from CA for the TCP Code on these overlapping issues until the Standard is finalised.
16. It is not clear what process the ACMA intends to follow in evaluating whether CA's agreed positions and draft proposals constitute sufficient progress at this stage of the TCP Code redevelopment to defer the initiation of other regulatory processes. If the ACMA undertakes a public consultation process to inform that decision, this document should be treated as a public submission.

Michael Cosgrave
Independent Adviser
January 2024