Australian Government

Department of Broadband,
Communications and the Digital Economy

Senate Standing Committee on Environment and Communications

Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 Inquiry

Department of Broadband, Communications and the Digital Economy Submission

May 2013

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1. Overview

The Department of Broadband, Communications and the Digital Economy (the Department) aims to help develop a vibrant, sustainable and internationally-competitive broadband, broadcasting and communications sector and, through this, promote the digital economy for the benefit of all Australians.

As part of this role, the Department undertakes reviews and provides policy advice to the Government on telecommunications consumer access and consumer safeguards and protections.

In order to ensure the telecommunications consumer protection framework operates as effectively as possible, amendments to telecommunications-related legislation are proposed to strengthen consumer protection and improve the telecommunications co-regulatory framework.

1.1. Telecommunications Legislation Amendment (Consumer Protection) Bill 2013

The Telecommunications Legislation Amendment (Consumer Protection) Bill 2013 (the Bill) will strengthen community safeguards and improve the telecommunications co-regulatory framework.

The Bill contains three measures, which will:

1. Improve the industry code process by:
    - introducing a new industry code variation process;
    - improving the transparency of the code development process; and
    - allowing code developers to be reimbursed for costs to vary consumer related industry codes.
2. Strengthen the effectiveness and accountability of the Telecommunications Industry Ombudsman (TIO) scheme; and
3. Enhance the operational efficiency of the *Do Not Call Register Act 2006* (DNCR Act).

1.2. Consultation

The legislative amendments to the *Telecommunications Act 1997* (the Telecommunications Act) and the *Telecommunications Consumer Protection and Service Standards Act 1999* (the Consumer Protection Act) are in response to recommendations from two departmental reviews:

- the 2010 review of consumer related industry code processes; and
- the 2012 review of the TIO scheme.

The amendments to the DNCR Act are in response to consultation with the Australian Communications and Media Authority (ACMA). Consultation has also occurred with the

telemarketing industry on this amendment through the Association for Data-driven Marketing and Advertising (ADMA).

As a whole, the amendments in the Bill are supported by industry and consumer advocates.

2. Reform of industry code processes

The telecommunications co-regulatory regime allows industry bodies or associations representing industry sections (code developers) to develop industry codes and register them with the ACMA. Part 6 of the Telecommunications Act sets out the process for registering industry codes.

However, the consultation undertaken by the Department in 2010 identified three connected issues that would strengthen the code development process:

1. the ability to vary industry codes;
2. greater transparency during the code development process; and
3. reimbursement of code development costs for variations to consumer related industry codes.

In developing the proposed amendments to the code development process, the Department consulted broadly with industry and consumer groups, including the Communications Alliance (CA) and the Australian Communications Consumer Action Network (ACCAN). Industry and consumer groups were generally supportive of the proposed amendments.

2.1. Variations to industry codes

The existing code development process requires codes to be wholly replaced rather than allow for variations to codes (section 120 of the Telecommunications Act).

This places an administrative burden on code developers and reduces the responsiveness of the code process. It has also led some consumer stakeholders to criticise the length of time taken for industry codes to react to changes in technology and the telecommunications market.

Consultation with industry consumer advocates and government agencies during the development of consumer related industry codes (for example the Telecommunications Consumer Protection Code, the TCP Code), identified that there is no existing mechanism available to make substantive variations or relatively quick variations to an industry code.

The proposed amendments will allow codes to be varied through a streamlined process – a process similar to that for developing industry codes except limited to the provisions of the industry code affected by the variations.

This is particularly important in the telecommunications industry where changes in market structure and technology can be rapid.

2.2. Transparency in developing industry codes

Transparency and accountability are important for stakeholders in the development or review of industry codes. At present, code developers are not required to publish submissions to a code development process.

Consultation by the Department identified that while code developers have not previously published submissions they received during consultation, as a matter of course, code developers do provide submissions to interested parties on request.

There is a strong view amongst stakeholders that requiring code developers to publish submissions will improve the transparency and accountability of the code development and review processes.

The proposed amendments in the Bill will address this issue by requiring code developers to publish on their websites submissions received from industry participants and the public about a draft code, or a variation to a code, during the submission period specified by the code developer.

2.3. Reimbursement of costs – variation of industry codes

Code developers varying consumer related industry codes may encounter similar expenses to those which are incurred when developing entirely new consumer related industry codes.

The ACMA and CA are the key parties involved in industry code development. Both these organisations support amending the Telecommunications Act to extend the application of the reimbursement scheme to also apply to varying consumer related industry codes.

Consistent with the existing industry code development process, the costs of varying consumer related industry codes will be recouped by telecommunications carriers through the carrier licence fees collected annually by the ACMA (for more information see the *Guide to the Reimbursement of Development Costs for Consumer-Related Telecommunications Industry Codes* available online at www.acma.gov.au/WEB/STANDARD/pc=PC_100428).

The proposed extension of the reimbursement scheme will continue to only be available for refundable costs approved by the ACMA regarding consumer related industry codes. The ACMA must still be satisfied of certain matters section 136B of the Telecommunications Act before a body or association is eligible for reimbursement of its refundable costs in varying such codes.

3. Telecommunications Industry Ombudsman scheme reforms

In March 2011, a discussion paper was released by the Department to examine options to reform the TIO scheme. The discussion paper sought views on the effectiveness of the TIO scheme in relation to its:

- speed, fairness and accuracy;
- consistency with Alternative Dispute Resolution best practice; and

- ability to promote and encourage industry efforts to deliver quality internal complaint resolution prior to outside intervention.

On 4 May 2012, the final report of the TIO Review was publicly released. The report provided recommendations reflecting the important role the TIO performs and the expected standards of its operation. The report is available online at the Department's website, www.dbcde.gov.au.

It is considered that the recommendations, once implemented, will make the TIO scheme more effective and transparent, and compatible with other industry dispute resolution schemes in Australia.

In developing the proposed amendments to reform the TIO scheme, the Department consulted broadly with industry and consumer groups, including CA and the ACCAN. The TIO, industry and consumer groups support the proposed amendments.

The remaining recommendations from the TIO Review which are outside of the legislative process have either been implemented, or are in the process of being implemented by the TIO and the ACMA.

3.1. Improved regulatory framework

Six benchmarks for industry based customer dispute resolution schemes were established by the Department of Industry, Science and Tourism in 1997. These are known as the DIST benchmarks and are regarded as the 'better practice' benchmarks for dispute resolution schemes.

The six DIST benchmarks are:

- accessibility
- accountability
- independence
- efficiency
- fairness
- effectiveness

Most Australian ombudsman schemes have been influenced by the DIST benchmarks. For example, the DIST benchmarks have been adopted by the finance industry, with the Australian Securities and Investments Commission (ASIC) using them as a guide in structuring its requirements for approving alternative dispute resolution schemes, as outlined in ASIC Regulatory Guide 139.

At present the Consumer Protection Act provides no guidance about the expected standards for the operation of the TIO scheme. While the TIO Constitution refers to the DIST benchmarks, there are currently no framework principles set out in legislation or regulation to which the TIO must abide.

This gives rise to a perception that the TIO is not bound by any particular regulatory standards, and there is some uncertainty as to the status and binding nature of the DIST benchmarks in respect to telecommunications services.

The Bill amends the Consumer Protection Act to provide the Minister with the discretion to determine standards with which the TIO must comply by way of legislative instrument.

The proposed amendment will enable the Minister to establish a set of framework principles to underpin the TIO's operations which are both consistent with best practice for other external dispute resolution schemes and relevant to the telecommunications industry.

Any such determination by the Minister will provide clarity and reassurance to end users, industry and other stakeholders that the principles in the benchmarks are reflected in the operations of the TIO.

There are clear boundaries on the determination making power in the proposed amendment:

- before making a determination, the Minister must consult with the ACMA and the TIO;
- when making a determination, the Minister must have regard to the DIST benchmarks, and any other relevant matters; and
- if a determination is made, it will be disallowable pursuant to section 42 of the *Legislative Instruments Act 2003* and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.

3.2. Statutory review of the TIO scheme

There is currently no formal mechanism by which the TIO is independently reviewed. While the TIO memorandum and articles of association provide that the TIO will conduct a review of its operations every three years, in practice reviews of the TIO have not been regular or public.

For example, the TIO board commissioned a review ahead of the Department's discussion paper in late 2010. However, no public announcement was made about the review or its terms of reference and no opportunity was provided for public submissions.

The proposed amendments will require that the TIO arrange an independent, and public, review of the scheme, at least every five years. The first of these reviews must be conducted three years after the commencement of the amending provision.

The person or body conducting the review will be required to consult with both the TIO and the ACMA in conducting their review and provide an opportunity for public comment. Following a review, the TIO will be required to publish a report on the review outcomes within six months of the review.

The proposed amendments will strengthen the TIO's public accountability and ensure that the scheme remains in step with public expectations.

There will be some costs to the TIO in sponsoring the independent public reviews of the scheme. This cost will be borne by telecommunications providers through TIO fees.

The five-year timeframe allows for sufficient fiscal planning and it is anticipated that the costs would be comparable to any review process undertaken by the TIO in accordance with current arrangements. It is expected that efficiency gains recognised in the reviews will offset the cost of the reviews themselves.

4. Improvements to the enforcement of the Do Not Call Register Act

The DNCR Act established the Do Not Call Register, which allows individuals to opt-out of receiving unsolicited telemarketing calls and marketing faxes. The Do Not Call Register is a successful government initiative, with more than 8.5 million numbers registered.

The DNCR Act provides rules about making telemarketing calls and sending marketing faxes. These rules include instances where a person (telemarketer or fax marketer) contracts another person to make telemarketing calls or send marketing faxes on their behalf.

The ACMA is responsible for enforcing the DNCR Act. The ACMA has advised that it has encountered difficulties in establishing evidentiary links between the first person (the telemarketer or fax marketer) and the other party providing the telemarketing or fax marketing services.

This has commonly arisen because agreements between the parties relating to the marketing of the first person's goods or services without any specific reference to the means by which the goods or services are to be marketed.

The proposed amendments will enhance the operational efficiency of the DNCR Act by allowing the ACMA to more readily establish an evidentiary link between a telemarketer or fax marketer and a third party providing telemarketing or fax marketing services on their behalf.

In considering this amendment, the Department approached the ADMA for comment. The ADMA has advised that it does not oppose the proposed amendment.