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Comments on the Department of Infrastructure, Transport, Regional Development and Communications Review of Consumer Safeguards—Part C—Choice and Fairness

1 Introduction and summary

1.1 Commpete—an industry alliance for competition in digital communications—welcomes the opportunity to comment on Part C of the Department of Infrastructure, Transport, Regional Development and Communications Review of Consumer Safeguards.

1.2 Commpete broadly supports the principles and proposals set out in the discussion paper. Indeed, in many respects it is difficult not to. However, we are concerned more with how such principles and proposals might be translated into regulation and then how that regulation might be administered in practice. It is there that even the best principles can lead to perverse outcomes.

1.3 We make the following general comments and respond to some (but not all) of the specific consultation questions further below.

a) Co-regulatory solutions are superior to other alternatives and co-regulation can take many forms, from meaningful consultation on proposed regulations through to industry developed and administered schemes. However, different industry participants have different degrees of capacity to contribute to co-regulatory outcomes.

b) Different types of consumer safeguards will be more or less suited to particular forms of co-regulation, at least in the first instance. It would be reasonable for the ACMA to have greater flexibility to determine, at the beginning of a new regulation-making process, which form of co-regulation would be most appropriate in the circumstances. Sometimes direct regulation (co-developed through consultation) may be the first best option when it comes to consumer safeguards.

c) An industry-developed code may not always be the most effective means of achieving a desired consumer safeguard outcome (as distinct from operational

matters), particularly if the safeguard involves a need for obligations that are largely borne by incumbents but which largely benefit challengers. For example, the time taken to effect local number portability—specifically, Category C complex ports—under the terms of the industry code have not seen any meaningfully improvement or tightening since they were first developed over 20 years ago because the burden principally falls on Telstra while the benefit accrues principally to consumers. A co-regulatory process that is dependent on consensus has not been able to achieve improvements to these outcomes despite the efficient switching processes having clear benefits for consumers and competition more generally. To accommodate such circumstances, greater flexibility should be available to the ACMA to declare and address specific deficiencies in industry-developed codes without necessarily disturbing the rest of the code.

d) Any greater flexibility or discretion given to the ACMA should be accompanied by measures that promote greater accountability.

2 On Proposal 1

Telecommunications-specific consumer protection rules should cover essential matters between consumers (including small businesses) and their communications providers.

- Both the economy-wide ACL and communications-specific consumer protections should continue to apply to the communications industry.
- Telecommunications-specific rules should provide protections for public interest matters and where there are limited market/commercial incentives for good service/fair treatment, for example, ethical sales practices, customer service and financial hardship.
- Telecommunications-specific rules should reflect key values and safeguards and address key risks to consumers/small business.
- Reform should result in a clearer and targeted set of rules and provide certainty for industry, consumers and small business and support enforcement.

This proposal is based on the following principles:

Principle 1: Rules are needed to drive customer-focused behaviour where market/commercial incentives are weak.

Market/commercial incentives are likely to be weak where a customer has already signed up to a contract. In areas like sales practices, financial hardship and customer transfers, commercial incentives and/or competitive pressures are not always aligned to customer needs.

Principle 2: Consumers should be treated fairly and in good faith by providers.

Consumers should be able to exercise informed choice and consent; products and services should perform as promised; issues should be resolved quickly; and all parties in the supply chain should work together and individually to deliver consumer outcomes.

2.1 The proposal seems reasonable, provided that a relatively broad perspective needs to be taken on what might be essential matters, including matters that are so closely related to essential matters that they need to be included in the same instrument.

2.2 Both the economy-wide ACL and communications-specific consumer protections should continue to apply to the communications industry.

2.3 Telecommunications-specific rules should provide protections for public interest matters and where there are limited market/commercial incentives for good service/fair treatment, for example, ethical sales practices, customer service and financial hardship. However, the ACMA (rather than the Minister) should be given a substantial discretion to determine whether there are or might be limited market/commercial incentives for good service, and be encouraged to take a sceptical view on whether those incentives will work across the full range of retail service providers. Since the protections are essential, they are essential for all consumers and should not be dependent on switching to other, more consumer-responsive service providers.

2.4 Telecommunications-specific rules should reflect key values and safeguards and address key risks to consumers/small business.

2.5 Reform should result in a clearer and targeted set of rules and provide certainty for industry, consumers and small business and support enforcement.

1. **What are the essential consumer protection matters that should be covered by the rules?**
Part 6 (section 113) of the Tel Act lists a range of matters that may be dealt with by industry codes and standards. The TCP Code covers some but not all of those matters. Are these the right starting points?

2.6 Yes, these are the right starting points.

2. **Do the existing consumer protection rules governing the retail relationship e.g. in the TCP Code and various standards and service provider determinations need to be redesigned, or are new rules required, to address increasingly complex supply chains? If so, why?**

2.7 The relationship needs to be considered in the light of more complex industry supply chains, but with the clear proviso that the consumer should not have to bear the burden of or negotiate the complexity. A consumer should be able to hold his/her retail service provider to account on all obligations, and it is for that service provider to have recourse, separately, along the supply chain. Wholesalers must be directly accountable to retailers for their contribution to the consumer service. Some typical

aspects of the relationships within the supply chain might well be covered by industry codes since they are best worked through within the forums of the industry itself.

3. **To what extent should third parties such as communication 'apps' providers be captured by any new rules, and why?**

2.8 In principle, consumer protections that apply to carrier service providers should apply to communications 'apps' providers, however legislative changes would be needed and a range of other considerations taken into account. For those reasons, the matter ought to be made subject to as separate review process and might be considered in conjunction with the ACCC's new platform services division.

3 On Proposal 2

The telecommunications consumer protection rule-making process should be reformed to improve its effectiveness.

- The industry code-making process could be strengthened. For example:
  - the triggers for ACMA to request and/or register a code could be changed
  - more flexibility could be provided to ACMA in setting timeframes for code development
  - the test for code registration could be strengthened
  - the period of time a code must be registered before ACMA can request that code deficiencies be remedied could be reduced; and
  - ACMA could be given the ability to make a standard where no code had been requested or an existing code found to be deficient.
- Alternatively (or in addition), ACMA or the Minister could develop essential consumer protection rules through direct regulation.
  - Industry codes would continue to be used, but would focus on providing guidance to industry on secondary, process and technical matters.

This proposal is based on the following principle:

Principle 3: The rule-making process should be timely, efficient, enable a wide range of views to be considered and produce clear, targeted rules.

The rule-making process will be less effective if it is unable to address emerging issues quickly, is overly burdensome for participants, and is unable to effectively balance/resolve contested issues and provide clarity for industry and consumers.

3.1 The code-making process should be strengthened by implementing all of the changes listed under the proposal. In particular:

a) The trigger for an ACMA request should be left to the ACMA's discretion based on its assessment that a code might materially improve the welfare of consumers in the sector – this being a low bar that is not intended to be reviewed, even though, as in the case of all decisions, the ACMA should be required to publish its reasons with the request.

b) The ACMA should be enabled to specify any timeframe that appears to it to be desirable and practicable. It should not be required to formally consult the industry on the matter of timeframes but would be encouraged to do so in an informal and efficient manner. The industry can always push back if a request is clearly not able to be entertained – and can always do this effectively by not agreeing with the request and not making the code.

c) It depends on what strengthening means here – presumably to make it easier for the ACMA not to register a code if it believes refusal to register to be the most appropriate consumer-beneficial course. The ACMA should not be subject to a high bar in refusing to register a code. Basically, ACMA should be able to take into account all objectives associated with sector development and consumer protection that it was established to progress, and to give them the weighting that it considers appropriate when deciding whether or not to register a code. As noted elsewhere in this response, other additional powers in relation to code amendments and mandating of code compliance would serve to increase the discretion that ACMA should have in registration and also change the consequences of registration. For example, it may be that ACMA would want to register a less than perfect code so that it can immediately, under the additional powers proposed in this document, make arrangements for desirable amendments.

d) The period for changes should be reduced – ideally to zero - so that the benefits of a code might be achieved as soon as possible, even if some sections need to be subject to a direction to amend or suspended pending amendment.

e) The ACMA should be given the ability to make a standard where no code had been requested or an existing code found to be deficient. The current arrangement is too conditional on showing that actual problems have arisen. No weight is given to assessment of needs in anticipation of issues, as would be the case in a genuinely risk-based approach.

3.2 The ACMA (but not the Minister) should have the potential to develop, where necessary, essential consumer protection rules through direct regulation. But this should be additional to improvements in code-making, not an alternative to such improvements.

1. What role should direct regulation, industry codes and guidelines play in a revised safeguards framework?

3.3 Direct regulation, industry codes and guidelines should all have a role to play in a revised safeguards framework. However, the role for direct regulation may need to be greater, with direct regulation being the default option and the appropriate choice when essential consumer safeguards are involved. Direct regulation should always be accompanied by public consultation processes that give interested parties an opportunity to influence final outcomes appropriately.

3.4 However, there is a challenge to be managed here. Markets often evolve quicker than direct regulation can respond and there are many examples where rules—in seeking clarity—rush to establish specific targets / metrics which incentivise some service providers to "game" said targets / metrics in ways that undermine the very spirit of those rules (Goodhart's law). As such, where direct regulation is adopted, it should begin by setting strong, clear conceptual principles in the first instance, which should later be supported by codification as needed (e.g. through the use of industry codes for further guidance on secondary process and technical matters).

3. Are current constraints on ACMA's power to make industry standards regulating consumer safeguards appropriate?

3.5 No, current constraints on ACMA's power to make industry standards regulating consumer safeguards are inappropriate because they are unreasonably conditional on flaws becoming apparent in codes. ACMA should have the power to make industry standards if it sees fit having regard to all of the objectives of the legislation and its own assessment of need. Clearly it would need to give reasons and have regard to codes and direct regulation that is current in the area of concern.

4 On Proposal 3

The essential telecommunications-specific consumer protection rules should be mandatory and directly enforceable by ACMA, and the enforcement options available should encourage compliance.

- ACMA should be able to directly enforce telecommunications-specific consumer protection rules.
- Code compliance should be mandatory if a code is registered by ACMA—a direction from ACMA to comply should no longer be required before infringement notices or pecuniary penalties can be invoked.
- More flexible and better calibrated enforcement options should be given to ACMA.
- ACMA should apply a risk-based approach to regulation, compliance and enforcement. Consistent with the Government's Regulator Performance Framework, ACMA will be an agile, timely and informed decision-maker and take actions which are targeted and commensurate with risk.
- ACMA should continue to communicate its compliance and enforcement priorities with industry and the public. It should work towards consolidating and simplifying how it communicates its consumer protection compliance priorities.

This proposal is based on the following principle:

Principle 4: The regulator should have appropriate powers and actively enforce consumer protection rules based on risk.

Consumer protections will not be effective if the penalties available for breaches do not encourage compliance, and the rules are not actively enforced.

4.1 This proposal seems reasonable, subject to the following observations.

4.2 The current approach which requires a multi-step process is unnecessarily inefficient and ineffective. Direct enforcement is to be preferred. It is challengeable in the courts so there is no question of service providers losing the right to a judicial review if they require it in any particular case.

4.3 Whether code compliance should be mandatory once a code is registered needs to be further thought through. The industry might be discouraged from making codes or from including certain content if it knows that the code will be mandatory once registered. However, it is possible that suitable language (permissive or directory language rather than the language of mandatory obligation) in specific provisions of a code will have the effect of leaving some discretions with service providers that the industry wants to retain. In that case a code might be mandatory, meaning that it must be taken into account, but certain provisions may not be. It would be preferable to have a default arrangement whereby codes are mandatory once registered but that the ACMA may nominate certain sections as voluntary, or as voluntary pending review. This approach is well known and works well in standards-making. If the power is with the ACMA, then

it will be open for the industry to make representations and put arguments why certain sections of a code should be voluntary. A rule of reason will prevail.

4.4 Yes, more flexible and better calibrated enforcement options should be given to ACMA.

4.5 The ACMA should apply a risk-based approach to regulation, compliance and enforcement. Risk-based means that the overall approach needs to take account of the apprehended risks of not acting or acting in different ways. This reinforces the notion that ACMA's powers of action should not be conditional on waiting for failure of codes or for problems to be clear and manifest.

4.6 The ACMA should continue to communicate its compliance and enforcement priorities with industry and the public, and yes, it should work towards consolidating and simplifying how it communicates its consumer protection compliance priorities. This seems to be self-evident.

5 On Proposal 4

The legacy obligations of declining relevance should be removed or adjusted as Telstra's legacy copper network is phased-out.

- Consistent with best practice regulation, outdated regulation should be removed or adjusted.
- The Department considers that free access to emergency services, number portability, calling line identification, and standard terms and conditions are enduring protections and should remain in place in direct regulation.
- The Department seeks views as to whether there is a continuing requirement for regulatory obligations covering pre-selection, the untimed local call obligation, directory assistance services, operator services, itemised billing, and powers to set price controls on Telstra.
- When revising or removing obligations, the needs of consumers with special requirements will be considered, including those with a disability or on low incomes.

This proposal is based on the following principles:

Principle 5: Consumer protections should remain in place where they are of enduring importance but be removed or phased out if they no longer serve a purpose.

Consumer protections are likely to be of enduring importance if they, for example, deliver outcomes in the areas of competition, access and participation, values and safeguards and the national interest.

Principle 6: Services should be available, accessible and affordable for all people in Australia.

Telecommunications are essential services and connectivity is increasingly critical, and in some cases required, to interact with business and government. Consumers should be able to access a service regardless of personal attributes (physical, cognitive, cultural) and purchasing a service should not create undue hardship, particularly for people on low incomes.

5.1 Outdated regulation should be removed because its continued appearance creates potential for confusion and distracts from the focus being sought with active and current regulation.

5.2 Commpete agrees that free access to emergency services, number portability, calling line identification, and standard terms and conditions are enduring protections and should remain in place in direct regulation. However, this list should not be regarded as being in any way exhaustive. They are simply clear examples of what should remain in direct regulation.

5.3 Each of the nominated legacy issues is dealt with in turn:

a) **pre-selection**: this obligation can be discharged at the earliest time, which might coincide, as the Department has noted, with the completed rollout of the NBN.

b) **directory assistance services**: this service is becoming less and less important for most consumers. Further analysis might enable the obligation to become more focussed to address needs that are not met through online services, such as access by vision-impaired and other disabled groups, or those requiring access to overseas numbers. It remains a further issue whether some of these uses might be better served via chargeable directory assistance services.

c) **operator services**: a similar approach needs to be taken here as in the case of directory assistance services. However, in this case there may be value in removing the service from the list of consumer protection obligations and leave it to individual service to decide what services they will provide, and also whether, in some cases, charges might be applied.

d) **itemised billing**: this should be offered on an as requested basis. Initially, perhaps, only items not covered by bundles and for which individual and separate charges are levied, might need be automatically itemised on bills.

e) **powers to set price controls on Telstra**: this should be removed as a specific obligation and replaced by a power that is linked to market dominance generally, whether by Telstra or any other service provider or group of service providers.

f) **The untimed local call obligation**: Commpete supports regulated instruments promoting access and affordability. The untimed local call gave effect to these principles achieved under the TCPSS Act, Part 4. This obligation has allowed all users of the Standard Telephone Service (STS) to pay a flat rate to make calls in their local call zone irrespective of their location across Australia.

Commpete agrees with the Department's view there is a diminished need for this obligation. Therefore it can be considered as a potential to grandfather in the future.

The original benefits to consumers and businesses of this obligation are arguably superseded. Most significantly this is a by-product market-based pricing whereby fixed voice and mobile plans include local calls within a fixed monthly cap. This pricing construct as seen in market trends is long established. It is highly unlikely there will be a reason to necessitate a market reversal of this in the future.

Commpete acknowledges the Department's comments that the creation of local call charging zones were a product of Telstra's copper network delivered at Exchange Service Areas (ESA). It must be noted however the untimed component of local call billing serves separate objectives which cannot be intertwined with the completion of the NBN build and removal of the copper network.

Commpete does not deem it appropriate to the set the timing of removal to coincide with the completed build of the NBN network earmarked for end 2020. There are ongoing user groups which will be adversely impacted should this occur. Examples include:

- consumers and businesses who have not yet been converted to service activation on NBN
- disadvantaged groups which still rely on basic voice usage and low use phone plans. These include for example; senior population and those who only require the NBN entry level data price tier suitable for low use voice.
- the vast number of smaller wholesale resellers which provide competition and choice in the market. These are likely to have untimed local calls embedded in their commercial contractual arrangements. The entrenchment of this obligation over many years suggests appropriate lead time is necessary to allow these to unravel.
- carrier interconnection agreements

Commpete supports simplification and continual review to ensure relevance of industry regulation. However, the existence of the above use cases suggests the removal of this obligation would need appropriate consideration and not changed in haste.

The co-existence of this obligation in parallel to the increased migration to the NBN is recommended. The continued existence of untimed local call obligation within TCPSS Act, Part 4 for a reasonable time period will not negate to the original goals to facilitate access and affordability. It could be argued the benefits of it is now limited to a smaller pool of beneficiaries.

Commpete does not support any gradual removal of the untimed local calls by geographic region. This would introduce significant billing complexity and resource burden within each companies billing systems to accurately administer. If untimed local calls were to be removed, then a complete removal at future set date is a more practical implementation approach.

Commpete would support the retention of the obligation, or a review of the impacts of removal. If a future date is set, Commpete recommends this to coincide with the completion of actual NBN service migration. An alternative is to evaluate within similar timing of the next ACCC FTAS pricing declaration.

5.4 Commpete agrees that when revising or removing obligations, the needs of consumers with special requirements will be considered, including those with a disability or on low incomes.

2. If obligations are not mandated, would these services continue to be provided by the market?

5.5 We do not know in most cases if these services would continue to be provided by the market, if they cease to be mandatory obligations. Clearly pre-selection would not. Others might be provided if charges can be levied for use of the service.

4. Which obligations, if no longer mandated, should be subject to transitional or grandfathering arrangements? What form should such arrangements take and how long should they remain in place?

5.6 Grandfathering is to be generally discouraged because expensive systems may need to be retained and costs incurred simply to provide a service that few require. A better approach is always to develop a transition plan that enables the industry to withdraw a service in an orderly manner or to change to a more focussed approach if the obligation is redefined and is evolved to something that better meets residual, current needs. In addition, time is required to provide appropriate notice to customers.

5. Is it appropriate for Telstra to continue to provide low income measures in relation to fixed line phone services for the duration of its contract as the USO provider?

5.7 No, it is not appropriate for Telstra to continue to provide low income measures in relation to fixed line phone services for the duration of its contract as the USO provider, and, to the extent that it is a delivery agent for Government, it would need to be compensated for taking on the role. The Government should be able to access beneficiaries of low-income measures directly, since it already delivers other non-telecommunications services in multiple ways to this group.

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