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The Australian Communications and Media Authority's

Telecommunications (Infringement Notices) Declaration 2011 and the proposed *Telecommunications Act 1997*—Infringement Notice Guidelines

Consultation Paper

Submission by Communications Alliance

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COMMUNICATIONS ALLIANCE

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, search engines, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance.

For more details about Communications Alliance, see http://www.commsalliance.com.au.

INTRODUCTION

Communications Alliance is pleased to have the opportunity to comment on the Australian Communications and Media Authority's Consultation Paper on the Telecommunications (Infringement Notices) Declaration 2011 and the proposed *Telecommunications Act 1997*—Infringement Notice Guidelines (the Consultation Paper).

Communications Alliance believes it is in the best interests of industry, customers, regulators and government that the industry takes a proactive role in assisting regulatory bodies with the development of practical enforcement measures which facilitate both increased consumer confidence without limiting opportunities for industry growth.

The structure of this submission reflects a common industry response to the key issues raised by the ACMA in the Consultation Paper. Members of Communications Alliance may also make individual submissions directly to ACMA following consideration of the Consultation Paper, the Declaration and the Infringement Notice Guidelines. This submission is intended to represent a consolidation of industry's position which complements the submissions of individual members but does not derogate from the individual positions advanced.

EXECUTIVE SUMMARY

Whilst acknowledging that a framework for establishing infringement penalties will provide industry with some form of guidance with regards to the consequences of non-compliance, Communications Alliance has identified four specific areas of concern where further clarification and detail is required:

(i) absence of a defined process for determining infringements and the application of infringement notices;

(ii) suitability of proposed infringement provisions;

(iii) application of discretionary factors when implementing infringement provisions that are specific to Mobile Premium Services; and

(iv) identification of additional discretionary factors when measuring suppliers against the CSG retail benchmarks.

PROCESS FOR DETERMINING AND APPLYING INFRINGEMENTS

(i) Process for determining if an infringement has occurred

Communications Alliance notes that Section 5.1 of the Guidelines sets out the range of factors to be taken into consideration by the ACMA when determining an appropriate enforcement response. Section 6 of the Guidelines then sets out the contents of an infringement notice and the process for extensions, withdrawals and publications of a notice. However the process for determining if an infringement is warranted has not been provided. This is a key omission.

By gaining some insight into the ACMA's proposed methodology for determining whether to issue an infringement notice, industry will be better positioned to understand the consequences of non-compliance. In some instances, the provisions to which infringement notices may apply are very broad, and it would be useful for industry to understand which aspects of those provisions are likely to be the subject of infringement notices. For example, Table 3 in the Consultation Paper specifies that under the proposed provision for sub-section s.462(1) of the Act, suppliers must comply with the Numbering Plan. Yet no guidance is provided detailing which sections of the Plan are considered to be significant within the context of the infringement notice regime. By clearly detailing, in the Guidelines, which section of the Numbering Plan has not been complied with, a supplier would be able to take remedial steps which could prevent similar breaches going forward.

Similarly, guidance on how compliance is to be measured against any given provision of the TIO Scheme is also absent. Table 2 of the Guideline specifies under sub-section s.132 of the *TCPSS Act (1999)* simply that members of the TIO Scheme must comply with the Scheme, yet the parameters for determining compliance with the Scheme, and which parts of the Scheme are covered by the amended bill, are not detailed.

The rationale behind provision s.132 in Table 2 is also a cause of concern on a general principle level. All licensed carriers and ISPs are already required under existing legislation to be members of the TIO Scheme. The Scheme has in place a regime whereby penalties can be applied in the event of systemic non-compliance. Communications Alliance contends that this in itself poses a significant deterrent against non-compliance with the Scheme, and questions why the ACMA considers there to be a need to impose an additional infringement notice regime. If the two regimes are to co-exist (which Communications Alliance maintains would be unnecessary duplication), there should be clear parameters to indicate at what point the ACMA's infringement notices could be issued for non-compliance with the TIO Scheme, so as to avoid any unnecessary overlap between the TIO Scheme and the infringement notice regime.

It is also significant that the ACMA, in its final Reconnecting the Customer Inquiry Report, has made recommendations on the TIO's governance framework and how compliance with the TIO Scheme could be better achieved, noting the potential for overlap with other regulatory instruments.

(ii) Process for application of infringement notices

The Guidelines do not provide in any detail the process for the application of an infringement notice on a provider. By way of comparison, breaches of the *SPAM Act* result in infringement notices being issued on a daily basis, calculated using the number of non-compliant messages sent each day. It is also not clear under the proposed regime whether infringement notices will be issued on a per record basis or by way of a cumulative infringement notice against that provider. Again, further clarity on the proposed methodology will assist industry's understanding of the proposed infringement notice regime.

The absence of a process explaining how new provisions might be added, and existing provisions removed, is also noted. Communications Alliance also seeks clarification on the process for the withdrawal of an infringement notice in the event that it is disputed or is deemed to be invalid. For example, Section 6.9 of the Guidelines specifies that to be effective, a withdrawal must occur within 28 days after the infringement notice was given, but does not specify the timeframe within which a request for withdrawal can be made. The lack of specificity around the timeframe for making a request for withdrawal means that there may be instances in which appropriate consideration cannot be given to a withdrawal application before the expiry of the 28 day deadline.

Accordingly, Communications Alliance submits that significantly more detail should be provided in each of the tables outlining the Declaration's provisions both in terms of how an infringement is determined and the processes for implementation.

SUITABILITY OF PROPOSED INFRINGEMENT PROVISIONS

Communications Alliance offers the following feedback on the provisions as detailed in tables 1-5 of the Consultation Paper:

- Industry is interested to see the provisions which the ACMA has deemed as suitable under the infringement notice regime. It was industry's understanding that the regime was brought about to enable the regulator to respond more quickly and efficiently to areas of great consumer detriment, and it is not clear that the specific provisions chosen by the ACMA necessarily meet those principles.

- How will the proposed infringement notices fit within the overall framework of enforcement actions that are available to the ACMA as detailed in Section 2 of the ACMA's Guidelines relating to ACMA's enforcement powers under the *Telecommunications Act*? It is assumed that infringement notices will comprise but one of the actions available to the ACMA.

- Has consideration been given to measuring the proportionality of the breach against the proposed penalty? Communications Alliance believes the ACMA should give consideration to the size of the impact of a particular breach on the community.

- Industry proposes that where there are multiple individual instances of the same breach then consideration should be given to placing a cap on the total amount that a provider can be penalised. This would be on the proviso that a provider had taken the necessary steps to rectify the non-compliance on an ongoing basis.

- Tables 1-5 in the Consultation Paper outlines very prescriptive provisions in some cases (e.g. provisions relating to mobile premium services in Table 5) but more general provisions in others such as those relating to the TIO Scheme and the Numbering Plan. Industry's clear preference is for a more prescriptive approach as this enables a provider to clearly understand the impacts of non-compliance.

- There does not appear to be any acknowledgement of, or consideration given to, existing regulatory instruments which in some cases, set out stringent service specific requirements which have contributed to a significant decrease in consumer complaints. Mobile Premium Services is an example of this, and is discussed in more detail in this submission. The stringent requirements of the Customer Service Guarantee are also noted in this context.

- The Consultation Paper and the Guidelines make frequent reference to the proposed position that a 'person' can be issued with an infringement notice. Communications Alliance seeks clarification from the ACMA with regards to the circumstances under which 'persons' can be issued with an infringement notice. For example, where an infringement notice is issued to an organisation, will the ACMA also be seeking to issue infringement notices to specific persons within that organisation? If so, will there be any parameters around who those persons are (for example, Directors and Officers)?

MOBILE PREMIUM SERVICES

Communications Alliance understands that the primary driver behind the infringement provisions relating to Mobile Premium Services (MPS), as detailed in Tables 5 and 6, is to facilitate the accountability of suppliers of these services at all levels of the supply chain. Accountability is enforced via the MPS Code obligation that all MPS suppliers must provide their company details to Communications Alliance for storage in the MPS Industry Register.

Industry submits that the following discretionary factors should be taken into account when determining if there has been a breach under provisions sub-s.2.1(1) and 2.1(2) provisions in Table 6:

- An MPS content provider may change names and / or ownership but not provide any notification to its contracted partners. Aggregators or contracted parties are not privy to this information unless advised by that provider yet under the proposed regime could be issued with an infringement notice.
- A provider could be 'deregistered' by the ACMA as a consequence of gross or systemic non-compliance, in which case all other MPS providers are prevented from undertaking any contractual agreements (and may cease any existing contracts) with that provider. At this time there is no formal process in place for alerting industry to the fact that a provider has been deregistered. This leaves open the potential for other providers who had previously existing agreements in place with the deregistered party to subsequently be found in breach.
- The proposed regime provides no details on how MPS Registration will be monitored. Potential options include an annual audit, linked to INMS taxes, or random spot checks generated by consumer complaints.

DISCRETIONARY FACTORS

The *Telecommunications Act 1997* – Infringement Notice Guidelines of the ACMA highlights the range of discretionary factors that the ACMA may consider in determining their appropriate enforcement response. They include:

- whether the conduct was deliberate, reckless or inadvertent;
- whether the conduct has caused, or may cause, detriment to another person and the nature, seriousness and extent of that detriment;
- whether the conduct involved indicates systemic issues which may pose ongoing compliance or enforcement issues;
- whether the regulated entity/person has been the subject of prior compliance or enforcement action and the outcome of that action;
- the compliance history and culture of the regulated entity;

- the specific and general educative/deterrent effect of taking action the seniority and level of experience of the person/s involved in the conduct;
- what, if any, action has been taken to remedy and address the consequences of the conduct;
- whether the subject of the investigation has co-operated with the ACMA; and
- whether the issues involved require urgent action/intervention by the ACMA.

However, Communications Alliance is of the view that the ACMA should also take account of the following factors in respect of the CSG retail performance benchmarks:

- Would performance against the CSG retail performance benchmark just under the prescribed benchmark figure be given any allowance, for example, would a reported figure of 89.5% be rounded up to 90%?
- Will low order volumes in a particular demographic region (e.g. remote areas) be taken into consideration? The difference between meeting or not meeting a performance benchmark could be a matter of only a few orders having missed the prescribed timeframe. In such instances, the ACMA should have regard to the level of consumer detriment caused by non-compliance with the benchmark.
- Was any consideration of 'extraordinary events', for example, the Brisbane floods and cyclone Yasi of early 2011, taken into account when determining a provider's CSG performance for a particular year? These extraordinary events should be seen as having far different impacts compared to seasonal extreme weather events. The latter can be addressed by claiming appropriate exemptions from the CSG Standard. However, extraordinary events can have a far greater impact on a provider's overall operations, the impacts of which may not necessarily be totally addressed by claiming exemptions from the CSG Standard.
- The length of the benchmark period. For example, the first benchmark period for CSG performance will be of 9 months duration only (1 October 2011 to 30 June 2012). The ACMA should make allowance for this shorter period as a provider's performance against a performance benchmark would be based upon a smaller volume of orders. Where performance against a particular benchmark was under 90% in two quarters, the provider concerned would only have one more quarter (and not 2) to improve annual performance to 90% or above. In addition, the seasonal impacts of the quarter ending 31 March 2012, which is subject to the most extreme weather events during a year, would only be spread over 9 months and not 12.

CONCLUSION

The telecommunications industry in Australia currently has in place a regulatory regime which is significant both in its scope and the degree of its prescriptiveness. The ACMA now proposes to apply an additional layer of regulation that would empower it with the ability to issue infringement notices where breaches of existing regulatory instruments have occurred. While it is acknowledged that the ACMA's rationale for adopting this regime is to provide an alternative to pursuing court action for specified breaches, the imposition of an additional layer of regulation has the potential to create significant duplication of obligations and additional operational requirements on providers. Where existing arrangements already have the facility to impose adequate penalties on non-compliant providers, such as under the TIO Scheme, it is questionable whether this new regime will actually have the desired outcome of improving provider behaviour.

If the ACMA's proposed infringement notice regime is to have the desired effect, Communications Alliance proposes that the processes for both determining non-compliance and applying an infringement notice need to be clearly set out to assist industry both at a compliance and operational level. The provisions mandating compliance with the TIO Scheme and Numbering Plan, for example, require significantly more detail and guidance than has been provided in the ACMA's Consultation Paper in order for them to have the desired deterrent effect, without imposing significant addition burden on providers.

Some level of discretion needs to be applied where minor aberrations in operational and retail activity could result in the highest level of infringement being applied. This is most evident when measuring compliance against the CSG benchmarks and the MPS Do Not Contact Determination.

Industry would welcome the opportunity to discuss the issues raised in this submission in greater detail with the ACMA.

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