

 	<p style="text-align: center;">ATUG Annual Conference</p> <p style="text-align: center;"><i>Making Phones Fair – Australian telecommunications and poor consumer practice</i></p> <p style="text-align: center;">Graeme Samuel, Chairman 13 March 2009, Sydney</p>
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Good morning.

I know many of you are used to hearing me speak about telecommunications investment, networks, infrastructure and access prices. This is a critical part of the ACCC's role in the telecommunications industry.

With the Government's National Broadband Network process underway, there has been much debate and discussion over the future of next generation access in Australia. The ACCC has played a significant role in the NBN process in terms of providing the Government's Expert Panel with detailed advice and a framework for assessing what a future telecommunications environment might look like. At the moment though, the NBN process is in the hands of the Government so I won't be discussing it any further today.

But the ACCC's role in relation to access regulation is merely one aspect of our involvement in the telecommunications sector.

This morning, I would like to put the focus squarely where it should be at a conference hosted by a telecommunications users group – on consumers.

Today, the ACCC is putting the telecommunications industry on notice. Misleading advertising, unfair contracts, inadequate disclosure and subscription scams are all in the ACCC's sights. Standards must improve or risk increased scrutiny and action.

In recent weeks, the ACCC has expressed its concern with ongoing practices in some parts of the telecommunications industry that are leaving many consumers frustrated, out of pocket and with services they don't want. While the ACCC would not normally address issues at a general industry level, there appears to be a broad awareness developing that the telecommunications industry is not consumer friendly. There are a number of indicators that support this perception, such as:

- the number and type of complaints received by the ACCC and the Telecommunications Industry Ombudsman;

- the need for recent initiatives, such as the TIO's connect.resolve campaign, to address consumer concerns about customer service in the industry; and
- an increasing level of investigations by the ACCC into consumer protection issues in the industry.

Indeed, in his recent announcement of the new Australian Consumer Law to tackle unfair contract terms, the Consumer Affairs Minister identified mobile phone contracts as an example of those types of contracts that will be subject to the new laws.

The range of investigations and actions the ACCC has taken and the types of complaints that we receive concern a number of different types of operators, conduct and telecommunications products and services. This suggests consumer protection issues are becoming more prevalent and persistent throughout the industry.

The risk is, if this continues, the industry's reputation with consumers may be irretrievably damaged. The provision of telecommunications services is so important to society and the Australian economy, consumers should be able to trust their providers, receive high quality customer service and be accurately informed about products and services.

The ACCC receives more than 4,000 complaints a year concerning consumer protection issues in the telecommunications sector. It consistently ranks number one in the sectors most complained through our InfoCentre.

The increase use and promotion of Internet service and mobile phones has led to both a rise in the volume, and change in type, of complaints and inquiries received by the ACCC. A number of complaints received by the ACCC allege misrepresentations about the nature of the product, and the failure to disclose material conditions of offers, consequently falling within the administrative ambit of the ACCC.

However most complaints received to the ACCC are more appropriately dealt by ACMA's code compliance regime such as the billing procedures and credit control.

The top 5 complained about telecommunication services by type are:

1. Mobile phones;
2. Line Rental;
3. Internet Broadband;
4. Local calls;
5. Long distance calls.

In the 12 months to July 2008, the ACCC had 22 active and major investigations into consumer protection issues in the telecommunications industry. To give you some perspective, the previous year there were 13. So

recent ACCC action shows that consumer protection issues are an ongoing challenge.

At the forefront of the ACCC's consumer actions are:

- Mobile premium services;
- Phone cards;
- Broadband advertising; and
- Inclusions in bundled packages.

The ACCC is drawing a line in the sand – we're saying to the poor performers, and there are many of them, mend your ways.

There is an important distinction to be made however between what can be identified as puffery and what is squarely in the realms of misleading and deceptive conduct.

Unfortunately we've become accustomed to sorting wheat from chaff in much advertising, but there is a significant volume of conduct which it would appear is intended to deceive and entrap – and that's illegal.

Mobile premium services

The ACCC consistently receives a large number of complaints about mobile premium services.

You are probably aware that mobile premium services are those SMS services that provide consumers with news, horoscopes, ring tones, games, competitions and other content.

Complaints primarily relate to allegations of unsolicited services and billing. About 50 per cent of MPS complaints are from consumers who received premium services they did not agree to. Around 20 consumers a month feel they've been duped into a service which is costing them in some instances considerable money.

Other complaints about MPS services concern:

- Advertising practices;
- Consumers not understanding the terms and conditions for the services, including signing up for what they believe was a 'one-off' service, only to find out later it was a subscription service;
- Difficulties in unsubscribing from services; and
- Complaints handling processes.

There can be up to three operators involved in the provision of mobile premium services: the content provider, the trader responsible for 'leasing out' the premium number and the mobile carrier.

In some cases the one trader can play all three roles. In all cases, each trader in the chain receives a percentage of the charge incurred by the consumer and these charges are higher than a normal telephone call. Often, there are ongoing weekly or monthly subscription charges.

Let me give you an example.

In October last year the ACCC obtained orders by consent in the Federal Court from TMG Asia Pacific Pty Ltd for false, misleading and deceptive conduct in advertising its premium rate mobile subscription quiz services.

The advertisements offered consumers a chance at winning a prize by texting in a response to TMG's '19' number. The ACCC alleged that the television advertisements did not adequately inform consumers that by responding they would be signed up to an ongoing subscription service charged at premium rates.

As well as declaring that TMG's conduct had contravened sections 52 and 53(e) and (g) of the *Trade Practices Act*, the court also made orders requiring TMG to -

- publish a corrective advertisement on television informing consumers that the advertisements in question were misleading
- implement a trade practices compliance program, and
- to pay the ACCC's agreed costs.

Advertisements that feature busy, distracting visuals and hard-to-read fine print raise significant concerns in any industry. However, they are far too common when it comes to advertising mobile premium services. Advertisements of this type seem to be designed to confuse consumers about what they are getting when they send in their text message. Ultimately, many are misled into signing up for a costly ongoing subscription service.

To address all links in the chain, the ACCC has recently written to local mobile carriers regarding mobile premium services and we are in the process of carefully examining the responses.

We expect carriers to adopt rigorous standards and procedures which in plain language means closing off access to their mobile networks for rogue operators.

If all carriers do not exhibit a responsible attitude to closing down rogue operators, they must expect the ACCC to pursue remedies available to it under the TPA.

But carriers are only one player in the MPS supply chain. Many of the content suppliers for premium services are based overseas. These operators should know the ACCC will not be deterred from pursuing those based overseas if their conduct potentially misleads Australian consumers.

The ACCC recently instituted legal proceedings against AMV Holdings Limited, a UK company, and Teracomm Limited, a Bulgarian company, for alleged misleading and deceptive advertisements for mobile premium services in the youth magazines, *Dolly*, *Girlfriend* and *TV Hits*.

A particular concern is that the target audience of such magazines may be young, unsophisticated readers who unwittingly cost themselves or their parents a lot of money by signing up to these services. The advertisements often have attractive and busy layouts and have inadequate or inappropriate use of fine print disclaimers.

Publishers should also note: they too may be liable for running ads which they know are misleading or deceptive.

The ACCC recently obtained enforceable undertakings from Pacific Magazines and ACP Magazines who publish these youth magazines. The undertakings require that ads for mobile premium services published in their magazines and targeting young readers, must clearly state:

- That the service is a subscription service;
- The cost of the service;
- The eligibility of consumers to receive the benefit of these services; and
- Where this information is revealed in the relevant terms and conditions of the services.

The ACCC encourages other media to be responsible in their advertising.

The publishers are also going to run an article in these magazines to inform their readers of the nature, cost and characteristics of mobile premium services.

This goes to addressing the very heart of the issue – ensuring consumers are educated and accurately informed when it comes to making their purchasing decisions.

The ACCC and ACMA have issued a fact sheet for consumers called “Your consumer rights: Mobile Premium Services”. The TIO was also consulted and the ACCC will continue to work with other organisations to improve the standard of conduct regarding MPS advertising.

As part of this, the ACCC has made a submission to the Communications Alliance in the development of a Mobile Premium Service Industry Code. The ACCC made a number of suggestions in response to the draft Industry Code, the most significant being that the Code should require MPS providers to use a ‘double opt-in’ mechanism, where a consumer requesting a subscription service would be required to take an extra step to confirm their purchase.

Improvements were also suggested in relation to information disclosure, advertising practices and complaint handling mechanisms. Finally, the ACCC

proposed that all consumers should be given the option of completely barring premium services from their mobile number. The ACCC argued that this would more effectively stop the provision and billing of mobile premium services without the consent of mobile phone customers.

The ACCC is now saying to the members of the Communications Alliance, get this Code finalised, it has been too long coming. Consultation and education are no substitutes for a rigorous Code that enables members of the industry, together with the regulatory authorities to stamp out the rogues.

It is important to note that in whatever form the Code is finalised, the obligations set down in the *Trade Practices Act* will continue to apply to conduct of carriers, aggregators and mobile premium service providers in this area.

The ACCC is currently looking closely into whether changes may be required to the business model used in the mobile premium services industry to ensure compliance with the *Trade Practices Act*. One possible change would be call barring mentioned above. An alternative would be for mobile premium services to be barred by default until a mobile phone customer requests them.

In the event that the Industry does not adequately address the consumer issues that the ACCC has observed, either through the Code or otherwise, more active intervention may be required. The ACCC will continue to rigorously enforce the *Trade Practices Act* in the interests of phone users.

Phone cards

Phone cards are another product where costs or calculation of charges may not be fully disclosed.

For travellers or those with family and friends overseas, phone cards are often an easy and economical way of keeping in touch.

The ACCC recently instituted proceedings against Tel.Pacific Limited in relation to the sale of certain pre-paid phone cards. The ACCC has alleged that Tel-Pacific represented that certain phone cards would provide consumers with a specified amount of call time when that was not the case. The ACCC also alleges that Tel.Pacific represented that no fees other than timed call charges would apply, when in fact other fees were charged.

'Unlimited' call claims

Similarly, the ACCC is firmly of the view, that companies advertising plans as 'unlimited' should be very cautious when using such terms.

To avoid misleading consumers, any qualifications to "unlimited" calls or SMS messages must be clearly stated and not so significant that they negate the overall impression of the ad.

The ACCC recently accepted enforceable undertakings from TPG Internet in relation to TPG's advertisements of its 'Unlimited Cap Saver' plan. The ACCC was concerned that TPG made false representations or engaged in misleading and deceptive conduct in the Unlimited Cap Saver plan by advertising that the plan:

- Included unlimited calls and text for \$59.99 each month, when, in fact, there were multiple exclusions to the plan; and
- Was available for the purchase price of \$59.99 per month, when, in fact, the minimum charge for the plan is \$79.99 due to an additional \$20 SIM card fee payable on registration.

And as "unlimited" does not always mean unlimited, so "free" does not always mean free.

In the past, the ACCC has taken action against companies who advertise phone handsets as 'free' or zero dollars, but then recover the cost of the handsets through higher call charges than those call charges available on comparable plans where no handset is included.

Accuracy of broadband download speeds

Likewise, lack of clarity in broadband advertising can easily give consumers a misleading impression in regards to download speeds.

The ACCC has long stated that it believes companies should avoid reference to "theoretical maximum" or "peak" speeds when making broadband speed claims. This is because there is any number of factors that could affect the broadband speed a consumer is able to achieve.

Instead, references to broadband speeds should be reflective of typical customer experience and should include actual speed ranges and information about factors that can impact speeds.

The ACCC has recently written to mobile and wireless broadband providers in relation to this issue. A number of providers are currently undertaking network upgrades – investment we welcome as enabling better service offerings to consumers, but, which has led to an increased number of representations about network speeds. The ACCC recognises operators will wish to inform consumers of changes and improvements to the network. However, this should be done in a way that does not create a misleading overall impression as to speeds typically achievable.

The ACCC strongly encourages broadband providers to ensure that any broadband speed representations made by them are consistent with actual customer experience.

Terms and conditions

And the ACCC encourages consumers to make sure they fully understand the terms and conditions.

In particular, when it comes to bundled services and packages, consumers should always ask themselves 'is it really a better deal'?

These are important questions consumers should ask, particularly when entering into an ongoing contract for services.

Telecommunication companies also have the responsibility to prominently display qualification or exclusions to offers in a way that it is easily understood by consumers.

In recently announcing the proposed Australian Consumer Law, which aims to tackle unfair contract terms, Consumer Affairs Minister Chris Bowen highlighted that standard form contracts, such as those used by mobile phone operators, are the kind of contracts that will be subject to the new laws.

The new laws will address terms in standard form non-negotiated contracts that create a significant imbalance to the detriment of the consumer and where it is not reasonably necessary to protect the legitimate business interests of the supplier.

Terms that might be affected by the new laws include those that:

- impose arbitrary time limits on claims
- prevent the consumer from cancelling a contract
- provide for exclusions of liability for failure to perform contractual obligations
- enable the supplier to alter the terms of the contract or any characteristic of the product or service to be provided on a unilateral basis without a valid reason
- enable the supplier to terminate a contract without reasonable notice except where there are serious grounds to do so
- give the supplier the right to determine whether the goods or services supplied conform with the contract, or exclusive right to interpret any term of the contract or
- exclude or restrict a consumer's right to take legal action or exercise any other legal remedy.

This is not an attempt to eradicate or restrict the use of standard form contracts – in many instances standard form contracts are an efficient way of providing goods and services. Rather, the new consumer laws will provide a more effective mechanism for ensuring that such contracts are fair.

The ACCC will be gaining new powers in relation to penalties, orders and notices and these will join the suite of tools already available to the ACCC in its pursuit of wrongdoers.

Scams

Sometimes, some of these misleading impressions come about simply through lack of care. But some behaviour is so deceitful and deleterious; it can only be described as a scam.

Random, unsolicited offers that consumers receive for “free” or low cost ring tones are often nothing more than a trap to lock consumers into an ongoing subscription service at premium rates, from which consumers have difficulty unsubscribing.

The ACCC maintains the SCAMwatch website to help educate and protect consumers against scams in all industries, not just telecommunications. But technological innovation, the high penetration of mobile phones and increasing take-up of internet access create more ways for scammers to target Australian consumers.

Just a few of the telecommunications scams identified on the SCAMwatch website include:

- Missed calls or texts from unknown numbers, when trying to contact these numbers results in consumers being redirected to a premium rate service and charged accordingly;
- SMS competitions and trivia scams, where response texts are charged at high rates and initial questions are very easy, but the last one or two questions may be extremely difficult or impossible to answer;
- On-line auction or shopping scams, where goods are not provided or bank account or credit card details are stolen; and
- “free” offers on the internet, that require a consumer to provide credit card or account details before a “prize” or download can be claimed.

Unfortunately there are many more scams out there preying on telecommunications users.

The ACCC continues to work with other members of the Australasian Consumer Fraud Taskforce to identify ways to tackle scammers as well as raise consumer awareness of scams.

National Consumer Fraud Week, held last week, is a key initiative of the ACFT to increase the sharing of information across state and international agencies, identify new trends in scams, encourage increased reporting of scams and develop new methods for fighting them. The centrepiece of this year’s campaign was a fraud forum where expert speakers from around Australia and internationally discussed the latest trends in fraud and methods for fighting it. Stories of several real life victims were also told publicly for the first time.

Conclusion

Unfortunately, I had too many examples to readily draw on when talking about consumer protection issues today.

It is clear that some in the telecommunications sector need to lift their game.

In advertising and promotion, the overall impression is what counts - advertisers must not rely on minute fine print to disclose important terms and conditions. Qualifications, limitations or exclusions must be disclosed and prominently stated and not so numerous that they negate the overall impression of the ad. The costs and nature of the services must be clearly identifiable within the advertisement, particularly if the target audience is vulnerable. Terms such as “unlimited” or “free” should be used cautiously. References to broadband speeds should be reflective of typical customer experience.

So, as I said at the beginning of this speech - operators should consider themselves on notice. If you mislead or deceive; withhold important information; fail to adequately disclose exclusions or limitations or create a wrong impression in your advertisements, you risk breaching the *Trade Practices Act*.

The ACCC will continue to be pro-active in its investigations and work with the TIO and ACMA as part of the Regulators Roundtable in addressing consumer issues.

We will use the full suite of tools available to us, including court action to correct the careless and stop the shonks as we continue to protect the interests of Australian telecommunication users.