

August 2018

TCP Code Working Committee  
Communications Alliance  
PO Box 444  
Milsons Point NSW 1565

By email: [info@commsalliance.com.au](mailto:info@commsalliance.com.au)

Dear Communications Alliance

### **Review of the Telecommunications Consumer Protection Code (DRC628:2018)**

Thank you for the opportunity to provide feedback on the proposed revisions to the Telecommunications Consumer Protection (TCP) Code (**the Proposed Code**). We set out below feedback on the proposed revisions to the Code as informed by the casework experience of the Legal Aid NSW Civil Division in assisting vulnerable clients to resolve disputes with their Telecommunications Suppliers.

#### **About our Civil Law Division**

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Consumer issues constitute the largest category of service for our Civil Law Division. Our work in consumer law is also informed by Legal Aid NSW's extensive outreach in regional and remote communities, including Aboriginal communities.

#### **Code Review Process**

Legal Aid NSW has been disappointed with the process for the Code review to date. In particular, we are concerned at the lack of engagement by the Working Group with a broad range of consumer interests, and the focus on technical revision rather than a more comprehensive review. Notwithstanding this, we appreciate the opportunity to

provide the following feedback in order to strengthen consumer protections and accessibility in the telecommunications industry.

## **Structure of the Proposed Code**

Legal Aid NSW is concerned that the strength of the compliance framework is weakened by moving the content of some substantive parts of the Code into Guidance Notes and Guidance Boxes. As explicitly stated at 1.5.2 of the Proposed Code, the guidance boxes within the draft TCP Code do not form part of the Code. The Guidance Notes are interpretative materials only, used to clarify requirements under the TCP Code, and do not set out binding obligations on Suppliers as done by the TCP Code. In short, the Guidance Notes serve to encourage best industry practice but do not necessarily require it.

Our view is that for minimum standards to be useful they need to be enforceable and accountable. As such, they should be contained in the Code wording itself. For example, consumers would benefit greatly from having enforceable standards relating to the protection of vulnerable consumers and sales practices and credit assessment included in the Code rather than in separate Industry Guidance Notes.

Following are our specific comments on the content of the Proposed Code.

### **Chapter 1 – General**

Clause 1.5.1 of the Proposed Code states:

- Suppliers are deemed to comply with the Code if they:*
- (a) Achieve the outcomes and actions formulated throughout chapters 4 to 9; and*
  - (b) Comply with the rules in chapter 4.*

Legal Aid NSW maintains that this deeming provision is misconceived as compliance should not be a matter for presumptions. We refer to our further discussion of the Proposed Code's compliance mechanisms below.

### **Chapter 3 – General Rules**

Section 3.2.3 of the Proposed Code states:

*A Supplier must communicate with a Consumer in a way that is appropriate to the Consumer's communication needs, including those with special needs.*

The term "special needs" is not a defined term within the Proposed Code. In our casework experience, Suppliers and their sales representatives often do not use interpreters when interacting with consumers either face-to-face or over the phone

when it is obvious that they have limited English language skills. As a result, consumer services are inaccessible, consumers end up with plans (particularly mobile phone plans) that do not meet their needs or plans are taken out in their name of which they never receive the benefit. Rather than use the term “special needs” we suggest that this provision could specifically identify that people with limited or no English, and people with a disability, may require aids for communication.

Recommendation: 3.2.3 of the Proposed Code should be amended to read:

*3.2.3 A Supplier must communicate with a Consumer in a way that is appropriate to the Consumer’s communication needs, including Consumers who have limited or no English, and Consumers with a disability.*

Section 3.5 of the Proposed Code sets out the obligations of Suppliers with respect to working with a Consumer appointed Advocate and is in the following terms:

*3.5.1 An Advocate is a person who cannot make changes on a Consumer’s behalf without the Consumer being present and agreeing to such action.*

*3.5.2 A Supplier must ensure that a Consumer can easily use an Advocate to communicate with the Supplier, if the Consumer requires.*

*3.5.3 A Supplier must advise the Consumer that a person acting as their Advocate has no power to act on the Consumer’s behalf and has no access to their information without the Consumer being present and agreeing to such action.*

Legal Aid NSW has experienced considerable difficulties accessing information on behalf of vulnerable consumers from Suppliers. This is in part due to the lack of clarity in the wording of the current Section 3.5, which does not explicitly state that a letter of authority from the consumer is sufficient to appoint an Advocate. We submit that the inclusion of the phrase “the Consumer being present” in the Proposed Code adds to this confusion.

Solicitors at Legal Aid NSW have reported that despite having a written authority from the client, Suppliers have insisted that the client provide a Power of Attorney or that the client attend a Supplier store front in person to authorise the appointment of an Advocate. These additional requirements can create unreasonable obstacles to vulnerable consumers and are in contradiction to proposed section 3.5.2 above. This is especially true for Consumers who do not speak English as a first language or those located regionally and remotely.

Legal Aid NSW also notes, on page 23 of the Proposed Code, the text box beneath paragraph 3.5.4 refers to a forthcoming Guidance Note on Assisting Vulnerable Customers. Our view is that not including information on vulnerable customers in the

Code itself is a missed opportunity. We refer to our discussion on the status of Guidance Notes above, and the lack of enforceability of Guidance Notes.

Recommendation: 3.5.3 of the Proposed Code be amended to read:

*3.5.3 A Supplier must advise the Consumer that a person acting as their Advocate has no power to act on the Consumer's behalf and has no access to their information without the Consumer being present and agreeing to such action **or providing authority in writing.***

Recommendation: Provisions relating to assistance for vulnerable customers be inserted into the TCP Code rather than be placed in a Guidance Note.

## **Chapter 6 – Credit and Debt Management**

Section 6.2 sets out what actions a Supplier must take to ensure Responsible Provision of Telecommunication Products. The Proposed Code at 6.2 includes the addition of a boxed Guidance Note which sets out what factors may be considered as part of a Credit Assessment for the Responsible Provision of Telecommunication Products. Legal Aid NSW believes that this list should also include an enquiry as to the number of dependents of the Customer.

In addition, when a Credit Assessment is conducted Legal Aid NSW proposes that all material collected as part of that Credit Assessment and views formed by the Supplier be recorded in written form so that the consumer can interrogate that information if there are allegations of maladministration.

Legal Aid NSW believes that obligations on Suppliers under this section should be extended to include a “not unsuitable” test similar to that which exists in the National Consumer Credit Legislation for the provision of consumer credit<sup>1</sup>. We submit that a presumption of unsuitability should be included in the Proposed Code where the contract does not meet the Consumer's requirements and objectives or where the Consumer cannot meet the financial obligations under the contract or can only do so with substantial hardship.

Where a contract is unsuitable, the Supplier should take steps to offer suitable alternatives products so that a consumer is not excluded from obtaining telecommunications as an essential service.

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<sup>1</sup> See section 133 *National Consumer Credit Protection Act 2009*.

Recommendation: Guidance Note 6.2 should also include an enquiry as to the number of dependents of the Customer.

Recommendation: All information revealed as part of a Credit Assessment should be kept in Customer's file in written form.

Recommendation: Chapter 6 should include an obligation on Suppliers that they must not provide an unsuitable Telecommunications Product. Where a product is deemed unsuitable, alternative products should be offered to the consumer.

## **Chapter 7 – Financial Hardship**

Legal Aid NSW supports the introduction of a standalone chapter on Financial Hardship. Based on our casework experience, Legal Aid NSW believes that the Financial Hardship regime outlined in Chapter 7 could be strengthened by creating greater transparency and by ensuring that consumers are aware of their appeal rights.

Recommendation: The following additional clauses to be added to Chapter 7:

- a) Where a Customer is not satisfied with the outcome of a Financial Hardship application, the Supplier must provide information to the Customer about how to seek review of the decision internally and by accessing external dispute resolution at the Telecommunications Industry Ombudsman.
- b) Where, in response to a Financial Hardship application, a Supplier places a Customer on a list which may prevent them from accessing future telecommunication services, the Supplier must inform the Customer of this and the proposed length of time in which their access will be barred.

## **Chapter 10 – Code Compliance and Monitoring**

Chapter 10 which addresses Code Compliance and Monitoring is to be read with Appendix 1 – Role of Communications Compliance.

Firstly, the Proposed Code appears to have mistakenly left references to Chapter 9 in the Appendix wording. It is our understanding that those references were intended to refer to "Chapter 10".

Legal Aid NSW believes the compliance regime under the TCP Code is weak and falls short of compliance and enforcement practice in other Industry Codes. We refer to the Banking Code Compliance Monitoring Committee (the CCMC). The CCMC adopts a proactive consumer protective function, and facilitates best practice. It actively investigates Code breaches, and reports on systemic issues. It also actively

participates in stakeholder engagement. Given the significant and increasingly critical role of telecommunications in Australians' day to day activities, the telecommunications industry needs to ensure that its Code compliance processes are equally rigorous.

By comparison, the compliance regime under the TCP Code is limited and uses language and processes that only encourage compliance and suggest industry improvements. Given the increasing importance of and reliance on telecommunications, the compliance regime requires a substantial review to ensure that consumers are guaranteed the substantive protections set out in the Proposed Code.

In Appendix 1 under the heading "*Referrals to the ACMA*", there is a list of circumstances in which Communications Compliance may refer Suppliers to the Regulator. Legal Aid NSW submits that for independent accountability and improved industry practice, the referrals listed under Appendix 1 should be mandatory and should also include the identification by Communications Compliance of any systemic issues raised in the course of their investigations and audits.

Recommendation: Appendix 1 in the Proposed Code be amended:

- a) References to Chapter 9 be replaced by Chapter 10
- b) Under heading *Referrals to ACMA* wording be amended to read:  
*Suppliers **must** also be referred to the ACMA where:*  
...  
**- Communications Compliance identifies a systemic issue**

Recommendation: The compliance regime under the TCP Code be comprehensively reviewed and redesigned to bring it line with the standard of other industry compliance regimes.

Recommendation: Material contained in the Industry Guidance Notes be included in the wording of the Proposed Code and subject to the same review process and consultation process as any amendments to the Code.

We make these recommendations in relation to the Proposed Code in order to increase consumer protection in the telecommunications industry. However, we also believe that because of the dynamic nature of the industry and the exponential importance of telecommunications products for consumers, the Proposed Code would benefit from a more substantial review and rewrite to make fit for purpose and use.

Thank you again for the opportunity to provide feedback on the Proposed Code. Please feel free to contact Tami Sokol on 02 9219 5892, or [Tami.Sokol@legalaid.nsw.gov.au](mailto:Tami.Sokol@legalaid.nsw.gov.au), if you have any questions.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'B. Thomas', written over a faint horizontal line.

Brendan Thomas  
**Chief Executive Officer**