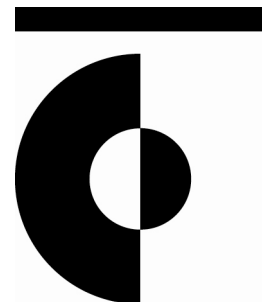


25 November 2011

Mr John Stanton
Chief Executive Officer
Communications Alliance Limited
PO Box 444
MILSONS POINT NSW 1565



**Telecommunications
Industry
Ombudsman**

Simon Cohen
Ombudsman

Dear Mr Stanton

Public Comment Draft Telecommunications Consumer Protections Code DR C628:2011

Thank you for providing the Telecommunications Industry Ombudsman (TIO) with the opportunity to contribute to the public comment draft of the Telecommunications Consumer Protections (TCP) Code. The TIO welcomes the release of the public comment version of the draft TCP Code.

We would like to acknowledge the significant effort and work that has gone into the review, consultation process and development of the draft TCP Code. The draft TCP Code as a whole represents a major step forward in the collaborative work undertaken by industry, consumer groups and regulators to improve consumer protection in the telecommunications industry.

We see the draft TCP Code, once finalised and implemented, as forming a fundamental component of the co-regulatory framework for the telecommunications industry. A fair and robust consumer protections industry code – with strong industry commitment to its objectives and compliance – will in our view increase consumer confidence in the telecommunications industry.

The TIO's submission in response to the draft TCP Code is enclosed for consideration of the Steering Committee and the respective working groups involved in the drafting of the draft TCP Code.

We trust that our comments in the enclosed submission will assist in the development of the final TCP Code.

Please do not hesitate to contact Shobini Mahendra, our Manager for Policy, Research and Quality Assurance on 03 8600 8762 should you have any questions.

Yours sincerely

Simon Cohen
Ombudsman

"... providing independent, just, informal and speedy resolution of complaints"

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Telecommunications Industry Ombudsman

Telecommunications Industry Ombudsman – Submission on the draft Telecommunications Consumer Protections (TCP) Code

November 2011



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About the TIO

The Telecommunications Industry Ombudsman (TIO) is a free and independent alternative dispute resolution service for small business and residential consumers in Australia who have a complaint about their telecommunications services.

We aim to resolve these complaints quickly in a fair, independent and informal way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances. Before the TIO becomes involved in a complaint, the service provider is given an opportunity to resolve the complaint with its customer.

We are independent of telecommunications companies, consumer groups and government.

For most complaints we receive, we establish the issues in dispute and the resolution sought, and then refer the consumer or small business to a designated point of contact at the relevant telephone or internet service provider. The provider is given a final opportunity to resolve the matter directly with the consumer, without the TIO's direct involvement. Around 90% of complaints we receive each year are resolved at this stage of the process.

Where the consumer and service provider do not reach an agreement at this early stage, the TIO becomes more directly involved by seeking to conciliate an agreed resolution between the parties. Around 7% of complaints are resolved using this conciliation process. We record possible code issues arising under industry codes where relevant during the referral and conciliation stages.

Complaints that cannot be resolved by conciliation are escalated for formal investigation by the TIO. If the complaint remains unresolved after formal investigation and the TIO is of the view that it would be fair and reasonable to do so, the TIO can make binding determinations up to a value of \$30,000 and non-binding recommendations up to a value of \$85,000 in respect of each complaint. We record confirmed breaches of industry codes where relevant at the conclusion of a formal investigation or determination, after a provider has had an opportunity to provide their view on whether they have complied with a code requirement.

We record complaints according to service types – internet, mobile, landline and mobile premium services (MPS), and by the types of issues that these complaints present. These issues include connection delays, credit management disputes, contractual disputes, customer service/complaint handling and billing disputes. Every complaint involves at least one issue. Some complaints can involve multiple issues – for example, a complaint about a delay in rectifying a faulty landline service may also involve a claim that the consumer's complaint about this fault was not acknowledged or escalated (a complaint handling issue).

Further information about the TIO is available at www.tio.com.au.

The TIO's approach to the draft Telecommunications Consumer Protections (TCP) Code

The TIO welcomes the release of the public comment version of the draft Telecommunications Consumer Protections Code (the draft TCP Code).

We see the draft TCP Code, once finalised and implemented, as forming a fundamental component of the co-regulatory framework for the telecommunications industry. A fair and robust consumer protections industry code – with strong industry commitment to its objectives and compliance – will in our view, increase consumer confidence in the telecommunications industry.

We have reviewed the draft TCP Code in the context of the following factors:

1. The TIO is the independent external dispute resolution scheme empowered to accept conferral of powers under the TCP Code. The TCP Code confers upon the TIO the functions and powers of receiving, investigating, facilitating resolutions of, making determinations or directions about, and reporting on complaints made to the TIO about matters arising under the TCP Code where these relate to services provided by members of the TIO Scheme.
2. We use the current TCP Code (and other industry codes) on a daily basis to investigate and resolve complaints. The inherent value of the TCP Code is recognised across the TIO, from our Enquiry Officers who use the TCP Code to provide information to consumers about good industry practice, to our Case Officers, Investigations Officers, Systemics and Senior Investigations Officers who use the TCP Code to conciliate, investigate and resolve complaints.
3. The TIO actively promotes the TCP Code as a benchmark for good industry practice, by providing information to members of the TIO Scheme about their obligations under the TCP Code.
4. Notwithstanding its inherent value, we have highlighted a number of gaps and deficiencies of the current TCP Code in recent submissions and reports including:
 - the TIO's submission to the Steering Committee for the TCP Code Review in July 2010
 - the TIO's submissions to the Australian Media and Communications Authority (the ACMA)'s *Reconnecting the Customer* Public Inquiry in September 2010, its Progress Report in February 2011 and its draft Report in July 2011
 - our detailed feedback at an officer level to Communications Alliance on an earlier draft of the TCP Code (version 6) in May 2011
 - the TIO's Occasional Paper on *Resilient Consumers* in August 2011 which highlighted the difficulties consumers face in their interactions with their service providers.

We have drawn on our extensive experience and familiarity with the current TCP Code and the types of complaints we commonly receive from consumers, to highlight a number of opportunities for improvement that can be made to the draft TCP Code. We have focused on areas that, if strengthened, would drive improved industry practices and hence, better consumer outcomes. We have also set out where relevant, complaint statistics or examples we have drawn from the complaints we commonly receive to clarify our comments on particular areas.

We set out in this submission:

- an overview of TIO complaint statistics including key trends about possible code issues and confirmed code breaches of the TCP Code
- our comments on the strengths of the draft TCP Code
- our general observations on the draft TCP Code
- our specific comments on the draft TCP Code by Chapter
- other issues that relate to the draft TCP Code
- relevant case studies in the attached Appendix.

We will also forward to Communications Alliance in a separate document, additional feedback on individual clauses and sub-clauses of the draft TCP Code for consideration of the working groups responsible for the relevant chapters of the draft TCP Code.

Complaints to the TIO

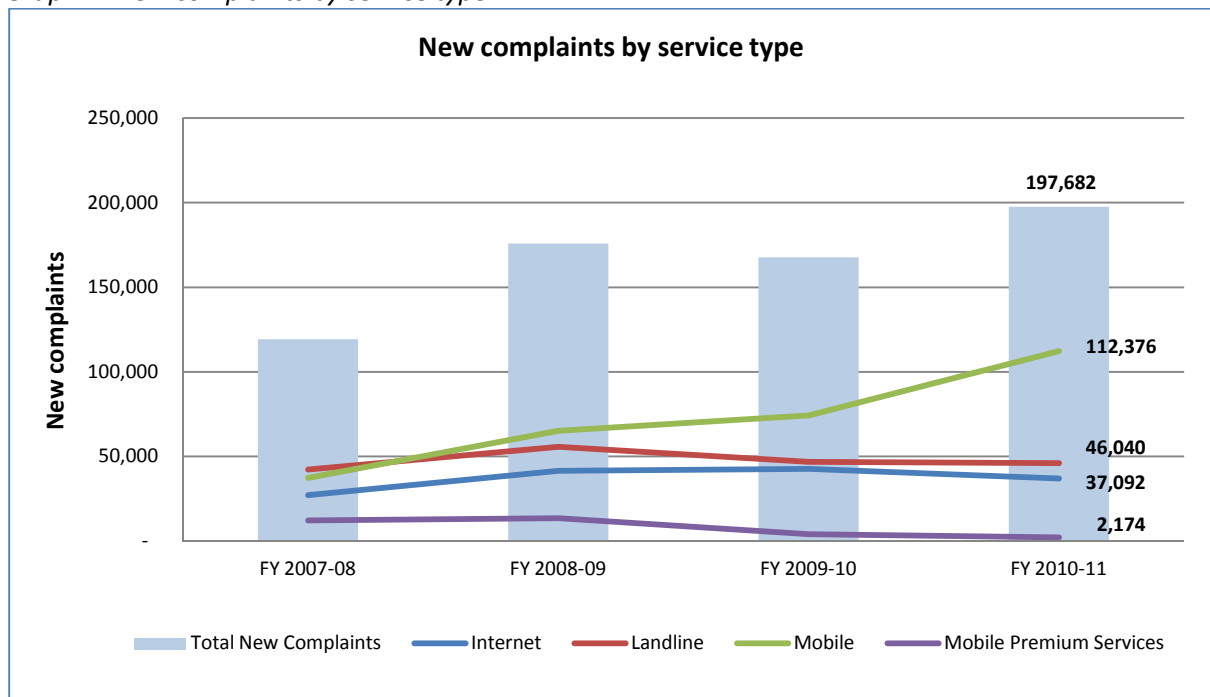
Overall complaint trends

When a consumer – residential or small business – contacts us about an expression of grievance or dissatisfaction about a matter within the TIO’s jurisdiction that the service provider has had an opportunity to consider, we record this as a ‘new complaint’.

The TIO recorded and handled 197,682 new complaints in 2010-11. This compares with 167,772 new complaints recorded during 2009-10. Customer service, complaint handling, billing and fault issues continued to be key areas generating new complaints to the TIO in 2010-11. The 17.8% increase in new complaints in 2010-11 compared to the previous year is mainly due to new complaints relating to network problems experienced by Vodafone as well as to the increase in the use of mobile smart phones in Australia.

Graph 1 shows the breakdown of new complaints recorded by the TIO by service type – internet, landline, mobile and mobile premium services – over the past 3 years and in 2010-11.

Graph 1: New complaints by service type

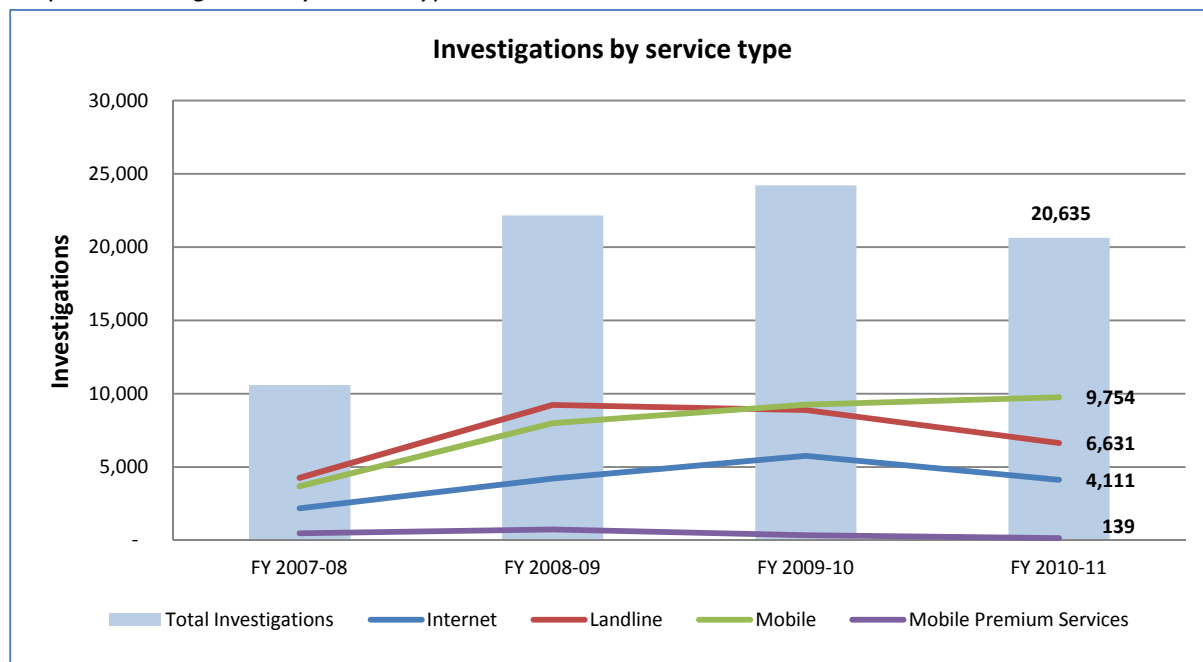


In some cases where a new complaint is not resolved and the TIO is required to conciliate, investigate or determine a resolution, we record these matters as ‘investigations’.

The TIO recorded and handled 20,635 investigations in 2010-11. This compares with 24,217 investigations recorded during 2009-10. As with issues recorded for new complaints, customer service and complaint handling continue to be key areas driving investigations in 2010-11. The decrease in investigations in 2010-11 was in part due to improved TIO processes at the referral and conciliation stages that helped service providers resolve complaints much earlier, as well as improved responsiveness by providers to resolve complaints once the TIO became involved.

Graph 2 shows the breakdown of investigations recorded by the TIO by service type – internet, landline, mobile and mobile premium services – over the past 3 years and in 2010-11.

Graph 2: Investigations by service type



Possible code issues under the TCP Code

When we refer to a ‘possible code issue’, this relates to a clause of an industry code that appears to be relevant to the complaint based on the consumer’s version of events or the available information. We record possible code issues at our referral and conciliation stages where the claims of the consumer indicate that a code compliance problem may exist¹. Possible code issues are rarely recorded at the formal investigations stage (as possible code issues are assessed, confirmed or dismissed at this stage).

Possible code issue data is only reported upon closure of a complaint.

In 2010-11, we recorded 442,491 possible code issues in relation to the current TCP Code. The most common possible code issue related to providers failing to supply accurate, relevant, current or timely information. Complaint handling issues about providers failing to action undertakings made to resolve complaints and billing related issues featured strongly in our possible code issues data in 2010-11.

¹ Possible code issues data is captured by the TIO in two different ways: (a) when recording a specific complaint issue at the referral stage, a TIO Officer may be prompted by the TIO’s complaint management system to answer a series of questions requiring ‘yes’ or ‘no’ answers, based on information provided by the consumer. These questions relate to obligations set out in industry codes which are incorporated into the TIO’s complaint management system. Depending on the information provided by the consumer and the answers to these questions, the system may automatically record possible code issues in relation to the complaint; and (b) where an unresolved complaint requires conciliation or investigation, the TIO Officer will consider the obligations set out in industry codes and raise these with the TIO member to assist in resolving the complaint. These possible code issues are then manually added to the TIO’s complaint management system.

Table 1 sets out a breakdown of the top 10 possible TCP Code issues in 2010-11.

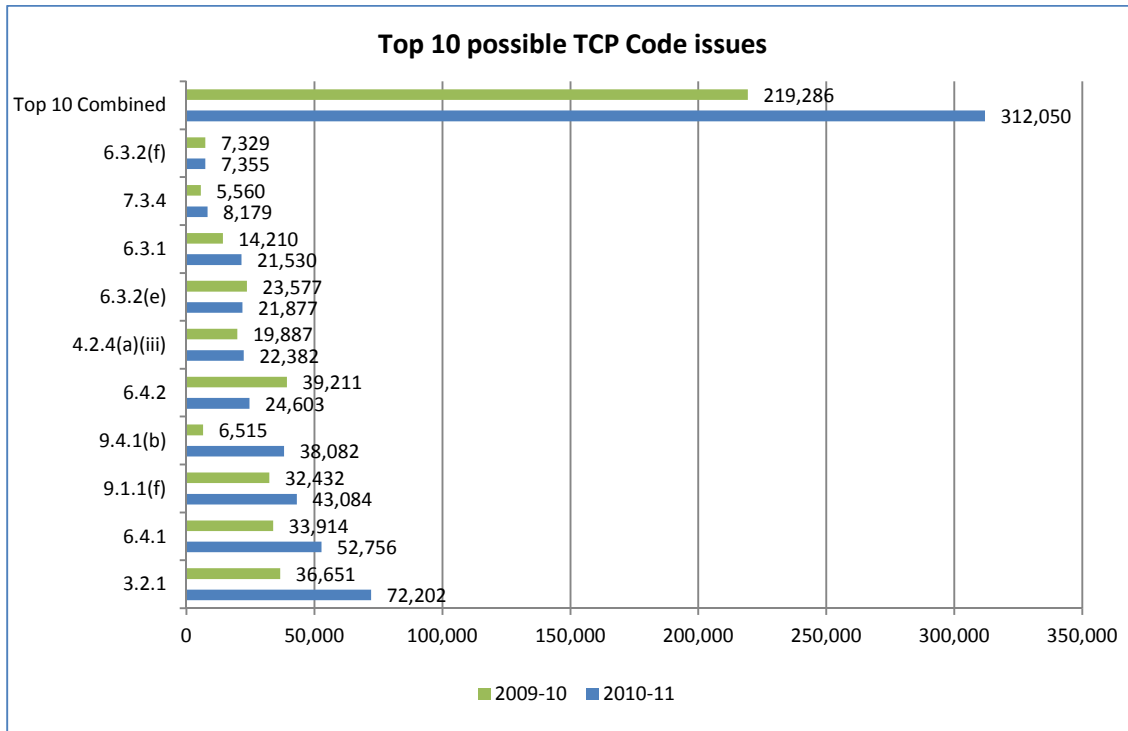
Table 1: Top 10 possible TCP Code issues in 2010-11

Clause	Description	Total Number	Percentage
TCP Code - Clause 3.2.1	The information that provider gives to a consumer must be accurate, relevant, current and timely	72,202	16.0 %
TCP Code - Clause 6.4.1	Providers must both ensure and be able to demonstrate that their billing is accurate	52,756	11.7%
TCP Code - Clause 9.1.1(f)	Providers must record, action and monitor the undertakings they make to resolve consumer complaints	43,084	9.5%
TCP Code - Clause 9.4.1(b)	Providers must supply information about alternative avenues of recourse when a consumer expresses dissatisfaction with the outcome to their complaint	38,082	8.4%
TCP Code - Clause 6.4.2	Bills must contain enough information for a consumer to be able to easily determine whether they have been billed accurately or not	24,603	5.4%
TCP Code - Clause 4.2.4(a)(iii)	If a consumer has made it clear that they are planning on using a product/service for a particular purpose, a provider must inform the consumer of anything they are aware of that might affect the consumer's ability to use the product/service for that purpose	22,382	4.9%
TCP Code - Clause 6.3.2(e)	Bills issued by a provider must include a description of the charges and credits being billed, including third party charges	21,877	4.8%
TCP Code - Clause 6.3.1	The items listed on a consumer's bill must be described in sufficient detail to enable the consumer to identify and understand what each charge is for	21,530	4.7%
TCP Code - Clause 7.3.4	Providers must both have and apply free credit control tools to manage customer expenditure where appropriate	8,179	1.8%
TCP Code - Clause 6.3.2(f)	Providers must ensure that their bills specify the total amount billed, all applicable credits/payments/discounts as well as the net amount payable by the consumer	7,355	1.6%

Billing and complaint handling issues also featured heavily in the most common possible code issues in 2009-10. However, we noted a significant increase (46%) in possible code issues in 2010-11 compared to 2009-10 that were recorded about the providers' lack of credit control tools to manage consumers' expenditure (clause 7.3.4 of the current TCP Code).

Graph 3 compares the top 10 possible code issues in 2009-10 and 2010-11.

Graph 3: Comparison of top 10 possible TCP Code issues in 2009-10 and 2010-11



Our possible code issues data provides an indication of trends about possible gaps or deficiencies in processes or practices of service providers when selling their services, charging for these services, and in dealing with their customers’ complaints. This data is provided to all TIO members on a monthly basis to help them identify these gaps and improve their practices.

Confirmed code breaches under the TCP Code

We capture ‘confirmed breaches’ against industry codes where evidence gathered during a formal investigation indicates that a breach has taken place. Confirmed code breaches are recorded only at the formal investigation stages of our complaint handling process.

The TIO records a confirmed code breach when:

- a possible code issue has been raised in writing with a TIO member during formal investigation of a complaint
- the TIO member has been invited to respond to the possible code issue and give supporting evidence, within a reasonable time
- in light of all available evidence including the TIO member’s response to the possible code issue, the TIO Officer has come to the conclusion that a breach of the relevant code obligation has occurred.

Confirmed code breach data code is only reported upon closure of a complaint.

The TIO recorded a total of 4,634 confirmed TCP Code breaches in 2010-11 with close to half of the confirmed breaches relating to complaint handling rules.

As we noted in our September 2010 submission to the ACMA's Public Inquiry on *Reconnecting the Customer*², service providers are required to have appropriate complaint handling processes under the TCP Code that promote fair, efficient and courteous resolution of complaints. We highlighted in that submission that consumers often tell us that their provider failed to inform them about their external avenues of redress, including the TIO.

The confirmed code breaches recorded in 2010-11 also indicate that providers are failing to action undertakings given to consumers to resolve complaints and failing to adequately resource their complaint handling departments.

The TIO notes that clause 7.3.4 of the current TCP Code features in the top 10 confirmed TCP Code breaches in 2010-11. This is indicative of the fact that Clause 7.3.4 remains an important minimum standard for the industry to ensure adequate credit control tools are in place to manage a consumer's expenditure and prevent a range of billing and credit management issues. Lack of these controls can result in 'bill shock', disputed charges, financial over commitment and financial hardship for consumers. We will comment further on this issue below.

Table 2 illustrates a breakdown of the top 10 confirmed TCP Code breaches in 2010-11.

Table 2: Top 10 confirmed TCP Code breaches in 2010-11

Clause	Description	Total Number	Percentage
TCP Code - Clause 9.1.1(f)	Providers must record, action and monitor the undertakings they make to resolve consumer complaints	703	15.1%
TCP Code - Clause 9.1.1(d)	A provider must ensure that its complaint handling department is sufficiently resourced	658	14.1%
TCP Code - Clause 9.2.5	A provider must seek to resolve a complaint at first contact, and where this is not possible the complaint must be finalised within 30 days or as soon as practicable in all the circumstances	519	11.1%
TCP Code - Clause 3.2.1	The information that provider gives to a consumer must be accurate, relevant, current and timely	462	9.9%
TCP Code - Clause 6.4.1	Providers must both ensure and be able to demonstrate that their billing is accurate	371	7.9%
TCP Code - Clause 7.3.4	Providers must both have and apply free credit control tools to manage customer expenditure where appropriate	150	3.2%
TCP Code - Clause 7.4.10(a)	A provider must not take credit management activity in relation to genuinely disputed amounts whilst that amount is the subject of an ongoing investigation	147	3.1%
TCP Code - Clause 6.4.2	Bills must contain enough information for a consumer to be able to easily determine whether they have been billed accurately or not	104	2.2%
TCP Code - Clause 4.2.4(a)(iii)	If a consumer has made it clear that they are planning on using a product/service for a particular purpose, a provider must inform the consumer of	73	1.5%

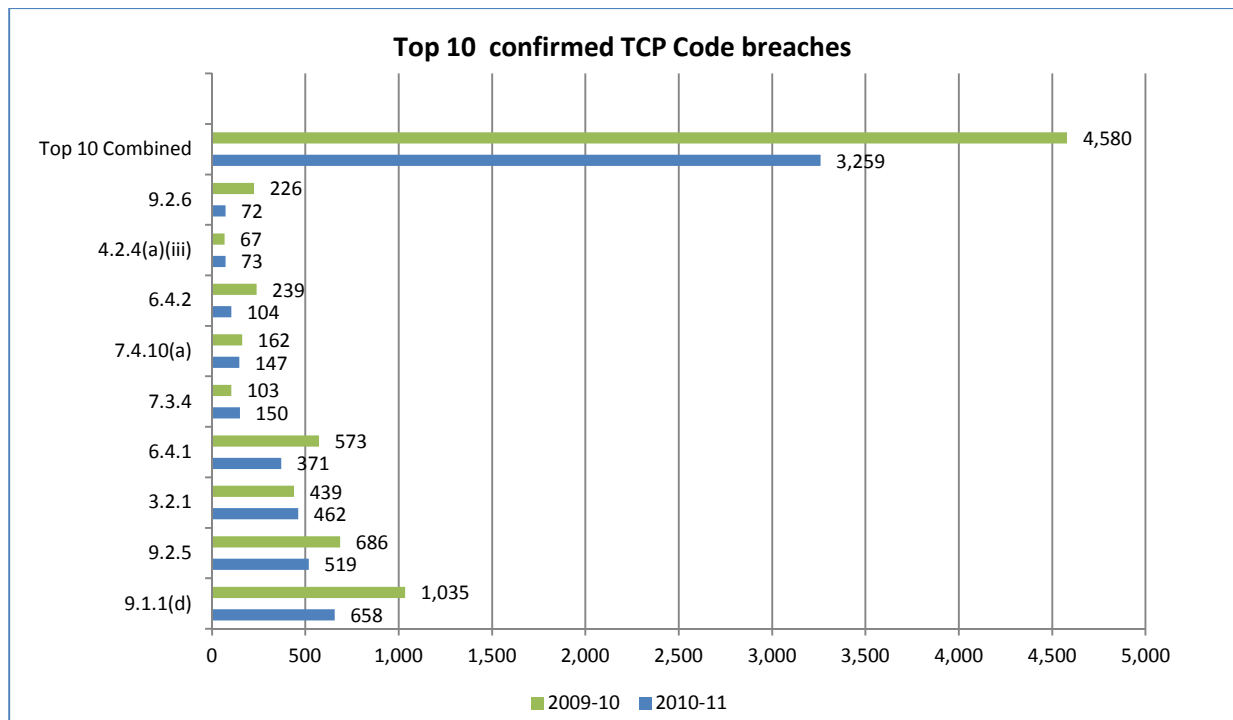
² Telecommunications Industry Ombudsman – Submission to the ACMA Public Inquiry *Reconnecting the Customer*, September 2010.

	anything they are aware of that might affect the consumer's ability to use the product/service for that purpose		
TCP Code - Clause 9.2.6	A provider must make every reasonable effort to tell a complainant within 5 working days about the complexity of the complaint and its probable timeframe for finalisation. The provider must also keep the complainant updated about timeframe delays and about the complaint's progress	72	1.5%

The number of confirmed TCP Code breaches recorded in 2010-11 represents a decrease of 29% from 2009-10 when 6,580 confirmed TCP Code breaches were recorded. This decrease is primarily due to the fewer formal investigations we conducted in 2010-11 because of improved TIO processes and improved responsiveness by providers in resolving complaints at an earlier stage after the TIO became involved.

Graph 4 compares the top 10 confirmed TCP Code breaches in 2009-10 and 2010-11.

Graph 4: Comparison of top 10 confirmed TCP Code breaches in 2009-10 and 2010-11



The TIO's confirmed code breach data highlights common areas of non-compliance by service providers with the TCP Code. This data is provided to all TIO members on a monthly basis to help them identify and address any gaps or problems with their processes or practices. We also provide this data to regulators on a monthly basis.

Strengths of the draft TCP Code

Before we comment on the areas in the draft TCP Code that present opportunities for improvement, we would like to acknowledge the significant effort and work that has gone into the review, consultation process and development of the draft TCP Code. The draft TCP Code as a whole represents a major step forward in the collaborative work undertaken by industry, consumer groups and regulators to improve consumer protection in the telecommunications industry.

We would like to acknowledge a number of strengths in the draft TCP Code in comparison to the existing TCP Code. In this respect, we are pleased to note the following:

1. The Key Commitments to Consumers are strong principles that underpin the draft TCP Code. We see these commitments as setting out a sound foundation for the new TCP Code and if complied with by service providers, delivering positive outcomes for consumers.
2. The use of key principles followed by prescriptive rules in the various Chapters in the draft TCP Code. We see the use of this approach as an improvement on the existing TCP Code which sets out processes without identifying 'actions' that need to be taken by service providers.
3. The removal of the use of the term 'cap' to describe any new Offers made after the registration of the TCP Code unless the Offer contains a Hard Cap. This is an extremely important improvement that may address consumer confusion and unusually high debt (bill shock) in the future. We note however, that this change will only apply to new Offers made after registration of the new TCP Code and not to roll-overs of existing Offers/plans.
4. The inclusion of principles and rules around customer service and about dealing with consumers with different needs, in Chapter 4. These will potentially address community expectations about minimum customer service standards and provide guidance about how service providers should address the needs of vulnerable or disadvantaged consumers.
5. The inclusion of rules around the information in the summary of Offers, specifically in relation to standard pricing information for post-paid mobile services, in Chapter 4. Although we have some recommendations around the applicability of these rules to other services, we note that this additional information will provide consumers with clarity around the cost of their post-paid mobile service.
6. Subject to our comments below about specific provisions in Chapter 4, the inclusion of the requirement for consent at the contractual stage is a worthwhile extension of the requirement for informed consent that currently only applies to transfers.
7. The greater emphasis on service providers offering services that are suitable for and meet the needs of, their customers, for example sub-clause 4.1.3.1(e) in Chapter 4.
8. The change in the back-billing rule from 190 days to 160 days in Chapter 5 that is likely to assist in the reduction of consumer complaints about delayed charges.
9. The inclusion of requirements in Chapter 8 that:

- all TIO costs relating to a complaint are to be borne by the service provider and not passed on to the consumer, and
- the service provider should not cancel a service just because the consumer came to the TIO for help to resolve their complaint.

Both these inclusions are likely to address instances of adversarial behavior by a small number of service providers who seek to cancel their customer's service or seek to recover TIO charges from their customer who complains to the TIO.

10. Greater emphasis on service providers to refer consumers to internal points of dispute resolution as well as to external avenues of dispute resolution, with more specific reference to the TIO being included in Chapter 8. We further note that a number of our earlier comments on draft 6 of the TCP Code have been incorporated in the public comment draft of the TCP Code. This is particularly pleasing and we note that Chapter 8 in the draft TCP Code provides greater clarity for service providers and their customers on how a complaint should be addressed and resolved.
11. We note that the overarching principles in Chapter 8 resonate throughout the prescriptive rules in that Chapter, making these prescriptive rules more focused on improved consumer outcomes. A similar approach in the other Chapters of the draft TCP Code, particularly Chapter 4 and Chapter 6, would improve these chapters.
12. The addition of a dedicated chapter (Chapter 9) in relation to compliance monitoring. While we have some suggestions regarding the enforcement of rules in this chapter, we welcome its inclusion.

We believe that the above strengths are improvements on the current TCP Code and will deliver improved consumer outcomes if there is strong commitment and adherence to these requirements by service providers across the industry.

General Comments on the draft TCP Code

Structure and consistency

There are a number of areas where we believe the structure and cohesiveness of the draft TCP Code could be improved. We offer the following broad suggestions:

1. Possible deconsolidation of Chapter 4

As a significant chapter in the draft TCP Code, Chapter 4 is long, complex and contains a number of groups of different issues.

To improve its accessibility for service providers and consumers, we suggest that Chapter 4 be separated into two distinct chapters: one on advertising, point of sale advice and contracts, and another on customer service, consumers with different needs, vulnerable and disadvantaged consumers, authorised representatives and privacy. Alternatively, the clauses surrounding

privacy, customer service, vulnerable and disadvantaged consumers and authorised representatives, could be moved into the General Rules chapter as these are relevant and important issues at all stages of the service provider/consumer relationship.

2. Structure of the principles and rules in the draft TCP Code

As mentioned above, we strongly support the use of key principles followed by prescriptive rules in the various Chapters of the draft TCP Code.

We suggest that clarification be included in the Introductory Statement to the draft TCP Code about the interrelationship between the principles and the rules to aid in the interpretation and use of the draft TCP Code. More specifically, we suggest that it is clearly stated in the draft TCP Code that providers should focus on compliance with the overarching principles in the draft TCP Code, and not just compliance with the prescriptive rules.

3. Consistency in drafting of the various Chapters

We note that in all of the Chapters other than Chapter 4, the key principles to be complied with by service providers are set out below the main rules and that these key principles are not numbered. Chapter 4 is different in terms of this format/structure compared to the other Chapters.

We suggest that there should be greater consistency in how the principles and rules are numbered and structured throughout the various Chapters in the draft TCP Code.

Accessibility

The draft TCP Code in our view remains an overly complex document, both in structure and language. It contains language and structure that some stakeholders may find difficult to understand. There are clauses and sub-clauses that contain multiple issues within single sentences and framed in complex language, for example, sub-clauses 4.1.3, 4.1.3.1(i), 4.1.4, 4.4.2.1(a), 4.5.1.1(c), 5.2.1(a), 8.2.1(a)(i)(C) – 2nd paragraph, 8.2.1(d), and 8.2.1(e).

We suggest that short sentences and a simpler structure should be used throughout the draft TCP Code to make it easier for consumers and staff of service providers to understand. It may also make the draft TCP Code simpler for service providers to apply.

Removal of the TCP Guidelines

The TIO notes that as part of the TCP Code review process, it is proposed that the TCP Guidelines will be removed. Whilst we understand that the draft TCP Code contains a wider range of prescriptive rules compared to the current TCP Code, we are of the view that the current TCP Guidelines provide useful guidance to service providers and their staff in their understanding and practical application of the current TCP Code.

We suggest that consideration be given to developing a set of Guidelines for the new TCP Code that provides additional guidance to service providers.

Compliance and monitoring

We welcome the inclusion of a stand-alone chapter (Chapter 9) dealing with compliance monitoring in the draft TCP Code.

As advised in our September 2010 and July 2011 submissions to the ACMA's Public Inquiry – *Reconnecting the Customer*, we believe that the strengthening of the current co-regulatory framework through more proactive industry monitoring of compliance with industry codes and standards, and through increased enforcement action against errant service providers, will benefit consumers significantly.

At this stage, the details of how the proposed Communications Compliance will operate or be funded are fairly limited. Key issues of independence and accountability are also not fully outlined.

We understand that constituent documents for this body are to be developed, and a close assessment of these will be required if confidence is to be had in the proposed new compliance body. We would envisage being consulted on these documents as they are being developed.

In the circumstances, we have not included detailed comments on clauses in Chapter 9 of the draft TCP Code in this submission, although we have included some broad suggestions on this chapter in the next section below.

Specific Comments on the draft TCP Code by Chapter

In this section of the TIO's submission, we have identified issues about specific clauses and sub-clauses in the draft TCP Code which we believe warrant further consideration.

We have also included where appropriate, references to case studies in the Appendix to highlight our specific concerns relating to the impact poor industry practices can have on consumers.

Chapter 2 – Definitions

1. Definition of Billing

The TIO suggests that pre-paid services should be expressly included in the definition of Billing because, like post-paid customers, pre-paid customers should have the same capacity to confirm that they are being charged accurately.

We have noted instances where pre-paid consumers have faced detriment by the lack of an obligation in the TCP Code to provide charging or billing information to these consumers. **Case Study 1** and **Case Study 3** in the Appendix illustrates some of the gaps within the existing TCP Code in relation to pre-paid or hybrid services.

2. Definition of Complaint

The draft TCP Code has an altered definition of a Complaint, which includes the requirement that if a consumer wants an initial call to be treated as a complaint, then the service provider

must treat it as such. However, the alteration also clearly sets out that a “... call to report a fault or service difficulty is not a complaint.”

The TIO has previously highlighted that ‘a fault or service difficulty’ should not be excluded from the definition of a Complaint. We reiterate our view that in our experience, consumers reporting a fault or service difficulty are usually complaining that their service is not working. Where intermittent faults or faults of a similar nature are not categorised as complaints, this may delay the resolution of a consumer’s concern and lead to a more protracted complaint. We note that in the current TCP Code, Clause 9.1.5 requires fault and complaint handling processes to be compatible and transparent to the consumer. There is no equivalent of this clause in the draft TCP Code.

By omitting the reporting of a fault from the definition of a ‘Complaint’, and with no equivalent provision in Chapter 8 of the draft TCP Code, this may create problems for consumers and providers when service difficulties arise. Further, we note that complaints that may be resolved through customer service or faults sections within a service provider may not be recorded in complaint databases. There is the potential for service providers (and industry) to miss critical information about causes of consumer dissatisfaction.

Another alteration in the draft TCP Code is that service providers ‘may’ ask a consumer if they wish to make a complaint. The previous draft indicated that if uncertain, service providers ‘must’ ask a consumer if they wished to make a complaint. We prefer the latter approach as this provides a layer of added protection to consumers.

3. Definition of disadvantaged and vulnerable consumers

The draft TCP Code now makes a number of references to consumers that may be disadvantaged or vulnerable. However, it still does not clearly define who this may include.

The TIO considers that it would be useful for providers to have clarity in relation to how a disadvantaged or vulnerable consumer may present in order that they have an understanding of their specific needs and can ensure that these consumers are not further disadvantaged.

As such, we reiterate our previous comment that although an exhaustive list would perhaps be difficult to include in the draft TCP Code, we suggest that a list of common examples such as that which appears in the TIO’s [Complaint Handling Procedures](#) or in the Australian Competition and Consumer Commission’s [Guide for dealing with vulnerable and disadvantaged consumers](#) would help to set minimum standards and increase awareness about the types of consumers who might be vulnerable or disadvantaged.

4. Definition of Consumer

We suggest that the definition of a business that falls within the definition of Consumer in the draft TCP Code, be reconsidered having regard to more recent trends where small businesses that do not have the ability to negotiate terms with their service provider but spend more than \$20,000 each year on their telecommunications products.

The \$20,000 annual expenditure threshold may not be a reasonable one in the current environment with greater bundling of telecommunications products where the service and equipment elements may come to a considerable sum each year. This threshold would also exclude small businesses whose business model revolves around using the internet or telephone more significantly than traditional methods of communication (for example, online businesses).

We suggest that annual expenditure should not be the only threshold to determine whether the business is a Consumer for the purposes of the draft TCP Code. A more flexible approach with a range of criteria (including for example, telecommunications spend, employee numbers and annual turnover) may be more appropriate to address the needs of a diverse range of small businesses who are consumers of telecommunications services and products.

5. Unbilled Charges

As previously suggested, the draft TCP Code's definition of unbilled charges should also include a reference to situations where service providers 'ought to have been aware of the charges given the circumstances'.

Chapter 3 – General rules

1. Dealing appropriately with consumers

We suggest that misleading and deceptive conduct and unfair sales practices should also be covered by clause 3.5.1 in Chapter 3.

2. Authorised representatives and Advocates

The TIO has seen instances of complaints where an authorised representative has been allowed to make changes or agree to new services when the legal lessee has not agreed that this is within the authority of their authorised representative. To avoid potential disputes, the TIO suggests that a new sub-clause be inserted under clause 3.6 in Chapter 3 to require that a legal lessee should always be told when they appoint a representative about what that representative can and cannot do on their behalf.

To ensure accessibility for consumers, we suggest that Authorised Representatives be included in clause 3.6.2 of Chapter 3.

Chapter 4 – Consumer sales, service and contracts

1. The definition of Offer and communication of Offers

The definition of Offers specifically excludes special promotions and non-standard Offers. This limits the strong protections in clause 4.1 of Chapter 4. It would appear logical that all Offers should be communicated in everyday language and give clarity to consumers.

2. Summary of Offer - Content

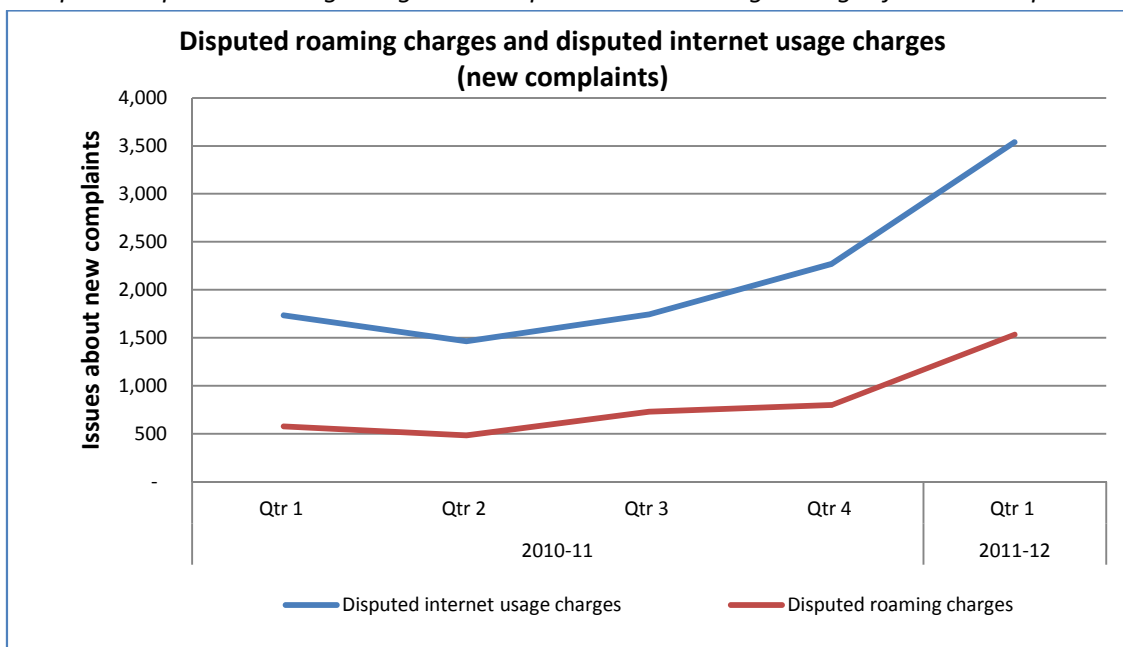
Clause 4.1.2(a) in Chapter 4 is new and appears to seek to address the ACMA’s recommendations in its report on *Reconnecting the Customer*. This clause has a 6 month implementation timeframe. We note that clause 4.1.2(a)(iii) is specifically limited to mobile post-paid services and requires service providers to provide three standard pricing elements (cost of a 2 minute standard national mobile call, cost of sending a standard national mobile SMS, and the cost of the use of one megabyte of data in Australia). Similarly, clause 4.1.2(a)(xi) specifically focuses on information about spend management tools for mobile calls, text and mobile data usage information.

This creates a gap for consumers who purchase pre-paid mobile services and consumers of internet services – where pricing information for making calls/text messages and downloading data respectively – are also important considerations when making purchasing decisions.

In recent months we have seen an increasing number of new complaints to the TIO about disputed roaming charges and disputed internet usage charges. Consumers who come to the TIO about these issues commonly are unclear about how they incurred these charges or are unaware that they would incur these charges if they used their services in a particular way.

Graph 5 illustrates the increase in new complaints about disputed roaming charges and disputed internet usage charges.

Graph 5: Disputed roaming charges and disputed internet usage charges for new complaints



We suggest that relevant pricing elements and information about spend management tools should also be included in any Summary of Offers for consumers of other services that can attract excess usage charges or unexpected charges if there is inadequate monitoring of a consumer’s spending.

3. Summary of Offer – Roaming charges

We suggest that clause 4.1.2(a)(x) should require providers to give consumers information about how to find out more about the higher charges when using their service overseas. It may also be important that the Summary of Offer explains that consumers can ask for their roaming function to be disabled or not activated, as a precautionary measure.

4. Provision of Summary of Offer prior to sale

Clause 4.1.2(c) limits the protection of this clause to post-paid services. We suggest that consideration be given to extend this protection to pre-paid services.

5. Remedies for inaccurate information

Clause 4.1.5.1(a) should include the requirement to empower staff to identify inaccurate information given to consumers, in addition to resolving these complaints with a remedy appropriate in the circumstances.

Clause 4.1.5.1(a) should also allow for the remedy of terminating a contract, to be without any early termination fees.

As for clause 4.1.5.1(b), we suggest that the wording of this clause be amended to state “monitor consumer enquiries and complaints”. In addition, the TIO notes that the requirement to address inaccurate information should not depend on whether this is a material issue – any issue involving inaccurate information needs to be addressed by the service provider.

Another suggestion is for this clause to include the requirement that any systemic issues about inaccurate information are addressed.

6. Advertising of Included Value

We note that clause 4.2.1.1(b) is restricted to mobile post paid services. We suggest that this clause should be made broader and cover pre-paid mobile services and other services that have included values.

7. Fair sales practices

Clause 4.3.1 starts with a broad obligation that “sales representatives must promote and sell ... in an open, honest and fair manner”, but sub-clause 4.3.1.1 appears to limit the application of clause 4.3.1 to two prescriptive steps about what the provider needs to do to meet the obligations under this clause. Although the TIO understands that the prescriptive sub-clauses are a useful tool for measuring and enforcing compliance, one suggestion may be that the prescriptive sub-clauses should not be presented as an exhaustive list.

We also suggest that a new sub-clause be inserted to cover the monitoring of complaints – so that service providers monitor complaints about conduct of their sales representatives/misleading advice/unfair practices, and take steps to address issues regarding this behaviour.

8. Fair sales practices, accurate description of products, appropriate behavior, consumers with different needs

Clauses 4.3.1, 4.3.2, 4.3.3 and 4.4.1 all only apply to the service provider's Sales Representatives. The requirements in these clauses should equally apply to all customer-facing staff of the service provider.

9. Informed consent

We observe that the requirements about consent in Chapter 4 are not necessarily consistent with the requirements for informed consent in Chapter 7. We suggest that Chapter 4 should include the requirements for informed consent that are set out in Chapter 7. This would ensure that there is greater consistency around the requirement for informed consent at various stages of a consumer's relationship with the service provider, whether this is at the initial point of sale or when upgrading a service/plan with the same service provider or when changing service providers.

In addition, we note that the requirements set out in 4.3.4.1(a) through (d) do not give rise to informed consent. For informed consent to be present, the service provider must have fulfilled all the earlier obligations in respect of their Offers and Advertising. One suggestion may be to expand clause 4.3.4.1 to reflect this.

While the concept of informed consent is important for all consumers, it is of particular significance when the consumer could be considered vulnerable or disadvantaged. Information that is provided to consumers about services that is clear, easy to understand and not onerous to digest is an obvious initiative to help consumers make informed decisions about the services they wish to purchase. Properly informed consent is a critical element that protects consumers by ensuring they have knowledge of what they have agreed to³.

Case study 2 in the Appendix illustrates the importance and value of informed consent.

We note that clause 4.3.6 requires that transactions are carried out fairly and accurately so that a consumer can make an informed choice. We suggest that Clause 4.3.4.1 incorporates similar wording.

10. Recordings of consumer consent

As outlined in the TIO's Position Statement on [Information provided during a sales transaction](#), the TIO takes the view that service providers need to keep a record of the entire point of sale conversation, not just the portion of the conversation where the consumer provides their agreement. This record may take the form of a verbal recording, or it may also take the form of a sales representative's written statement. We have seen instances of complaints where the consumer's informed consent and understanding of the Offer is very much influenced by the

³ Telecommunications Industry Ombudsman – Submission to the ACMA Public Inquiry *Reconnecting the Customer*, September 2010.

entire point of sale conversation, and not just the portion that contains the terms and conditions.

One suggestion may be that this requirement (keeping more detailed records) be included in sub-clause 4.3.4.1(c) of Chapter 4.

11. Consumers with different needs

As noted above, we believe that clause 4.4 and related provisions apply across all aspects of the service provider/consumer relationship. Having processes in place to help consumers with different needs is just as important in billing enquiries, fault reporting and the making of complaints. As such, we reiterate our earlier suggestion that such obligations would be better placed in Chapter 3 or in a separate Chapter with customer service.

For consumers with different needs, we also suggest that consideration be given to the inclusion of a requirement in clause 4.4.1 for service providers to proactively assist consumers with different language needs including for example, by offering an interpreter service to assist these consumers, particularly when these consumers seek to make fault reports or have queries about their bills/credit related issues, or when they seek to make a complaint. We acknowledge that there may be costs considerations for service providers. However, these costs should be carefully considered in light of improved customer service and accessibility for these consumers, which could in turn reduce complaints.

12. Content of Consumer Contracts

We note that clause 4.5.2 of the draft TCP Code does not include some of the current provisions in clause 4.2.6 of the existing TCP Code that relate to the content of Consumer Contracts. These provisions include details of the charges, frequency of charges and how these may be calculated, the circumstances for termination of the contract and early termination fees applicable, and how changes to the contracts may occur. We suggest that it would be useful to include these provisions in clause 4.5.2.

13. Customer Service – Effective Service

As acknowledged above, the inclusion of customer service rules in Chapter 4 is a welcome addition to the draft TCP Code.

As previously noted, customer service excellence should be present in all interactions between service providers and consumers. We suggest that the obligations under clause 4.6 should be in the General Rules chapter, or in a separate chapter dedicated to communicating with consumers. Clause 4.3.3 could be similarly included.

It is acknowledged in most of the literature around effective customer service and complaint handling, that service providers' staff should be properly trained and empowered to resolve enquiries and complaints. We suggest that additional obligations are included in sub-clause 4.6.1.1 to require service providers to ensure that their staff are:

- (a) appropriately trained to address customer enquiries and complaints, including those relating to product information, billing, terms and conditions, credit related issues , and
- (b) empowered to properly resolve these enquiries and complaints, particularly at first contact.

Chapter 5 – Billing

1. Charging policies and rules

Clauses 5.2.1 and 5.2.2 provide that in some cases consumers who are billed a fixed amount will not be issued with a bill unless the total amount payable is 20% higher than the fixed amount. This clause raises a few questions, such as, how are consumers to know when their payment is due and how much is due, as well as why has the amount of 20% been selected? Clause 5.2.2 states that the service provider must obtain the consumer’s prior consent to any charge that will be applied in addition to the fixed amount, but it does not state if the service provider must do this prior to each individual payment and how the service provider is to meet this requirement.

We suggest that the draft TCP Code includes the requirement that consumers should be able to verify the accuracy of charges each time the amount they are charged exceeds the agreed fixed amount.

2. Charging and verification rules for pre-paid services under Clauses 5.2 and 5.5

There is no obligation upon service providers in Chapter 5 of the draft TCP Code to ensure that pre-paid services are being charged accurately, that credits are being applied correctly, and that pre-paid customers are able to verify whether or not the charges are correct. This appears to be a significant disadvantage for pre-paid customers.

Case study 3 in the Appendix illustrates some of the difficulties consumers face when charges are applied to pre-paid mobile services without their knowledge.

The TIO’s Systemic Investigations team undertook an investigation with a provider that had claimed a particular capped plan was essentially pre-paid and as such, specific provisions relating to direct debits, excess usage and credit management in the current TCP Code did not apply. The TIO is concerned that by continuing to exclude pre-paid services from protections afforded to consumers using post-paid services, the industry is placing pre-paid consumers at a distinct disadvantage. See **Case Study 1** in the Appendix.

We suggest that it is made clear in the draft TCP Code that pre-paid consumers should be able to get all information about charges relating to their service and to be able to verify whether or not the charges are correct.

3. Format of Bill Media

Clause 5.2.3 requires service providers to offer its customers the ability to receive a bill and any billing information in a Bill Media that the customer is able to store and reproduce. It is unclear

whether a consumer who does not have internet access, would be able to obtain paper bills if the service provider only offers bills via an online mechanism.

We suggest that this clause includes a requirement that a service provider cannot charge a consumer if they request to receive a paper bill, if they do not have access to other forms of Bill Media offered by the service provider.

4. Billing information at no cost

Clause 5.2.6 states that service providers must provide billing information to its customer at no cost for a period of 13 months after the last itemised charge incurred. It is common that consumers are contracted to a service for a period of 24 months and it would seem fair that a consumer should be able to obtain billing information at no cost during this time.

We suggest that the 13 month timeframe be the minimum timeframe, and that the timeframe be extended where a consumer has more than 13 months remaining in their contract.

5. Cost of Billing Enquiry

We welcome the requirement in clause 5.2.8 whereby service providers that provide access to a billing enquiry point by telephone (including mobile phones) must do so at untimed call rates. We recommend this requirement be extended so that other interactions, for example, calls to report a fault or to the customer service area, are also charged using untimed call rates. Alternatively, it may be preferable for the draft TCP Code to recommend that service providers offer a free call service for consumers to make these calls.

6. Cost of data containing Billing information

As for clause 5.2.9, we also welcome the free data requirement. We suggest that access to all forms of electronic information about a service, such as the terms and conditions, should be available on a site where the service provider does not charge for data downloads.

7. Direct debits

The TIO welcomes the addition of clause 5.7.1(e) in the draft TCP Code. However, we note that clause 5.7.1 does not mention what a service provider must do if there are amounts in dispute on a bill.

We suggest that this clause specifically provide that service providers must not direct debit disputed amounts.

As for sub-clause 5.7.1(f), the TIO considers that 3 working days may be too long for a service provider to cancel a direct debit authorisation and that the service provider should act to halt the direct debit immediately or at most within a few hours upon request of the consumer. Where the request for payment has already been passed on to the consumer's financial institution the TIO understands that the halt might not be easy.

We suggest that the service provider should be required to:

- (a) contact the financial institution directly to try to halt the direct debit promptly, and
- (b) refer the consumer to their financial institution to request cancellation of the payment.

8. Direct debits and pre-paid plans

Case Study 1 illustrates a number of difficulties faced by consumers as a result of gaps within the existing TCP Code in so far as this relates to pre-paid or similar plans. In this systemic investigation, the TIO identified three issues that the TIO considered were indicative of potential gaps within the existing TCP Code. These were:

- (a) the notification to consumers of bank account debits for the 'pre-paid' credit and excess usage
- (b) the notification to consumers of an impending restriction of a service
- (c) some elements of the provider's over commitment policy.

Given our findings in the systemic investigation outlined in **Case Study 1** about issue (a) above, we suggest that the draft TCP Code contain the following safeguards:

- pre-paid plans that allow for debiting of additional charges and excess usage charges should be covered by the protections within Chapter 5 of the draft TCP Code
- a provider's terms and conditions cannot expressly contract a consumer out of not receiving notification of direct debits
- any direct debits are taken only after a consumer has had the opportunity to properly verify the amount, and that the draft TCP Code defines adequate notification as including the amount to be debited, when it is to be debited and what the consumer can do to enquire about the impending debit.

Our other findings about credit and debt management from this systemic investigation are set out below.

9. Updating billing address

The TIO commonly receives complaints where consumers find it very difficult to update their billing address.

We suggest that Chapter 5 of the draft TCP Code include an obligation for service providers to ensure that consumers can easily update their billing information and for a timeframe to be included for the completion of such a request.

Chapter 6 – Credit and debt management

1. Definition of credit assessment

We note that one suggestion made by the TIO has been adopted in relation to Chapter 6 of the draft Code. This relates to the inclusion of the definition of 'credit assessment' in relation to a service provider's credit assessment processes.

2. Spend management tools and international roaming

We note that clause 6.6.1(d) of the draft TCP Code has been expanded to provide greater clarity on when providers will notify consumers when data usage is increasing. It provides for notifications to be issued when 50%, 80% and 100% of the data allowance included in the consumer's plan has been used.

It relates specifically to:

“(d) for Residential Customers, where offering a post-paid mobile or internet plan with an included data allowance and in circumstances where no shaping/throttling or Hard Cap applies...”

The TIO has two critical concerns with this clause.

First, it only applies to residential consumers. The TIO continues to receive an increasing number of complaints from small businesses about excess data usage and roaming charges, and/or unusually high bills because there are inadequate spend management tools or notification of high debt in a timely manner.

Second, this clause only applies when the data usage and/or expenditure is *“incurred within Australia”*. Given the TIO has received a number of complaints regarding excessive data usage when consumers are overseas and that high international roaming charges is a growing complaint issue (see Graph 5 above), neglecting to provide for overseas usage is likely to continue to drive complaints. While the TIO is aware that there are delays in providers receiving alerts from overseas carriers, it seems reasonable to include some provision for this given the increasing numbers of complaints and the quantum involved.

Case Study 4 illustrates why notifications about excess usage charges incurred outside Australia is a critical safeguard that should be included in the draft TCP Code.

We note that on 1 July 2010, the European Union (EU) introduced additional regulation to regulate global roaming charges for providers operating in the EU⁴. The additional regulation is a safeguard aimed at protecting consumers from global roaming ‘bill shock’. The bill shock limit is set at 50€ (Euro) unless requested to be increased by the consumer. Consumers receive SMS warnings notifying them of usage until their access is blocked at the 50€ limit. An EU commissioned Review of the effectiveness of the regulation in July 2011 noted that the regulation has caused wholesale and retail global roaming prices to drop⁵.

⁴ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile communications networks within the Community, as amended by Regulation (EC) No 544/2009.

⁵ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the outcome of the functioning of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile communications networks within the Community, as amended by Regulation (EC) No 544/2009.

3. Information about an impending restriction

As outlined above, the TIO's systemic investigation in **Case Study 1** identified three issues that the TIO considered were indicative of potential gaps within the existing TCP Code. These were:

- (a) the notification to consumers of bank account debits for the 'pre-paid' credit and excess usage
- (b) the notification to consumers of an impending restriction of a service
- (c) some elements of the provider's over commitment policy.

Given our findings in the systemic investigation outlined in **Case Study 1** about issue (b) above, we suggest that the draft TCP Code contain the following safeguards:

- pre-paid plans that allow for debiting of additional credits and excess usage charges should be covered by the protections within Chapter 7 of the draft TCP Code
- the relevant obligations in Chapter 7 that relate to restriction, suspension and disconnection of a service should apply to all types of plans, including pre-paid plans
- the notification for the impending restriction, suspension or disconnection should contain information about when this is to take place and what the consumer can do to enquire about the impending restriction, suspension or disconnection
- the notification should also include information about how a consumer can dispute the impending restriction, suspension or disconnection, including information about the TIO.

4. Over-commitment policy

As outlined above, the TIO's systemic investigation in **Case Study 1** identified three issues that the TIO considered were indicative of potential gaps within the existing TCP Code. These were:

- (a) the notification to consumers of bank account debits for the 'pre-paid' credit and excess usage
- (b) the notification to consumers of an impending restriction of a service
- (c) some elements of the provider's over commitment policy.

As for issue (c) above, the TIO noted that the current TCP Code does not compel a provider to have an over commitment policy, although the TIO considers this to be good practice. In light of our findings in the systemic investigation outlined in **Case Study 1**, we suggest that the draft TCP Code contain the following safeguards:

- providers who offer plans or services that can result in consumers being exposed to unusually high debt, should have an over commitment policy
- the over commitment policy should set out:
 - how the provider will monitor their customers' usage, charges and debt
 - how the provider will identify an unusually high bill or debt, or the accumulation of charges over a period that result in high debt
 - what steps a provider needs to take where a consumer is incurring an unusually high bill or debt

- what advice or warning a provider needs to offer to minimise the customer's exposure to the bill or debt
- what steps a provider needs to take to limit the consumer's exposure to more debt, and
- that the provider should have regard to the individual consumer's minimum regular charges for the service, usual usage and payment history when implementing its over commitment policy.

Our suggestions above are related to the comments below about the omission of the current clause 7.3.4 of the TCP Code in the draft TCP Code.

5. Service provider's credit control tools – omission of the current clause 7.3.4

The TIO has previously raised our concerns regarding the increase of over-commitment issues in our September 2010 submission to the ACMA's Public Inquiry on *Reconnecting the Customer*. In our submission⁶, the TIO specifically highlighted that one of the factors causing these complaints related to service providers “...not putting in place adequate credit control tools or providing the right information to ensure that consumers are not put in a position of financial over commitment.”

One of the more significant clauses that the TIO considers provides protections for both service providers and consumers alike continues to be omitted from the draft TCP Code. This is clause 7.3.4 in the current TCP Code:

Credit control by Suppliers: *A Supplier must have credit control tools in place which the Supplier applies, without charge, for the purpose of managing a Customer's expenditure, where appropriate.*

This clause requires service providers to recognise unusually high spending on their customer's services and then act to prevent the debt from becoming larger. This appears to have been omitted from the draft TCP Code and is a provision that the TIO believes benefits consumers and providers. We note that the clauses in Chapter 6 of the draft TCP Code do not impose an active obligation on service providers to have processes in place to monitor and control consumers' high usage and exposure to financial over-commitment.

Case Study 5 illustrates the importance of clause 7.3.4 of the existing TCP Code and why the TIO considers that this obligation should be included in the draft TCP Code.

6. Access to information about payment and debt collection process

We suggest that clause 6.7.1(b) of the draft TCP Code include an express requirement that the consumer be told that they can request the suspension of portions of their debt whilst those charges are in dispute and under consideration of the TIO or another relevant external agency.

⁶ Telecommunications Industry Ombudsman – Submission to the ACMA Public Inquiry *Reconnecting the Customer*, September 2010.

Given the TIO advises consumers that they should pay undisputed charges and providers are aware of this, it seems logical that providers should also be informing their customers that the disputed charges will be 'quarantined' while under consideration by the TIO or any other external agency. This prevents these disputed charges continuing to appear on invoices and attracting late payment fees.

7. Notice to restrict, suspend or disconnect a service

The TIO has a number of suggestions regarding clause 6.8 of the draft TCP Code that are mainly focused on the details of the sub-clauses pertaining to the responsibilities and obligations of the service provider.

These suggestions include obligations for service providers to:

- provide for the manner and how often service providers should 'inform' consumers that they are about to restrict, suspend or disconnect a service
- inform consumers that other services may be affected by a restriction, suspension or disconnection (for example, a disconnection of a landline service may affect the consumer's broadband service)
- include a referral to internal and external avenues of dispute resolution, including the TIO, in any notification of disconnection
- give consumers specific information regarding a possible credit default and what this means.

Given the TIO often receives complaints regarding suspended or disconnected services where the consumer claims to have not been contacted prior to the event, it would be useful to have prescriptive obligations on providers to ensure that they have provided reasonable notice of the above issues prior to restricting, suspending or disconnecting a service.

Further, the TIO's experience is that consumers do not have an understanding or awareness of what a credit default means; how long it will remain on their credit history; and that even if the debt is paid, the default will only be amended not removed. It would seem reasonable for providers to explicitly outline the consequences of a credit default prior to one being applied.

8. Fair credit management process

We make the following suggestions regarding the various sub-clauses under clause 6.9 of the draft TCP Code:

- where a consumer remains dissatisfied with the outcome of a review under sub-clause 6.9.1(a), we suggest that the consumer be given information about their external avenues of redress including the TIO
- where the service provider's mistake resulted in the suspension or disconnection of a consumer's service with another provider, sub-clause 6.9.1(b) should also require the service provider to reimburse the reasonable costs of reconnection that may be imposed by that other provider
- where credit management charges are intended to be imposed, sub-clause 6.9.1(c) should include that the service provider's costs must be reasonable, they must be provided for in

the Consumer Contract, and that the consumer needs to be informed about these charges at the point of sale as well as when credit management commences

- where a consumer has been default listed in error or through no fault of their own, sub-clauses 6.9.1(e) and (g) should also include a requirement that the service provider should follow up with the Credit Reporting Agency to ensure the prompt removal of the incorrect default listing. In this regard, we note that the Credit Reporting Code of Conduct requires the credit reporting agency to amend any incorrect default listings as soon as practicable but in any event, within 5 working days⁷.

9. Financial Hardship

We have a number of suggestions regarding a service provider's obligations around financial hardship and the policies and procedures that should be put in place in relation to clauses 6.12, 6.13, 6.14 and 6.15. These suggestions include obligations that service providers should:

- examine whether a customer's debt is reasonable in all of the circumstances
- examine whether a service provider should consider alternative plans that will assist and/or suit the consumer
- educate their customers on the spend management tools available to them when discussing payment arrangements
- suspend credit management activities (including potential default listings) while financial hardship or a payment arrangement is being negotiated or assessed, when further information is requested from the customer and when the customer either seeks an internal review or seeks to refer the decision to an external agency
- keep a specific record of a financial hardship arrangement, including the decision making process.

We believe that including the above requirements in the draft TCP Code will protect both the consumer and the service provider so that each party is aware of their obligations and responsibilities.

The TIO often investigates complaints about financial hardship and/or payment arrangements that arise because of a provider's lack of understanding or flexibility on a consumer's circumstances. As such, it is vital that industry has a clear understanding that consumers are seeking to address and retire outstanding debts, but may not be in a position to do so in a short space of time. As it is preferable for debts to be paid over time rather than not at all, a flexible approach may be one that is more worthwhile.

⁷ Credit Reporting Code of Conduct, clause 3.8, available at <http://www.privacy.gov.au/materials/types/codesofconduct/view/6787>.

Chapter 7 – Changing suppliers

1. Confirmation that transfers are possible

We suggest that the draft TCP Code include an obligation on service providers to confirm that services are actually transferable before they make an undertaking or offer to perform the transfer.

This will become more important with proposed changes to the Numbering Plan which will allow local numbers to be allocated to other geographical areas. In addition, transfers of certain types of services (for example, if on a particular provider's DSLAM) may not be possible. If this transfer 'pre-check' is not possible, the draft TCP Code could require the service provider to tell the consumer that the offer to transfer the service is subject to checking that the service can be transferred, and that the consumer would be notified by the service provider within a specified timeframe if this was not possible.

2. Obtaining informed consent

We suggest that clarification or guidance is provided in the draft TCP Code as to what would satisfy the requirement for service providers to use 'reasonable endeavours' in clause 7.2.1 of the draft TCP Code. For example, in the context of a small business consumer, what would the service provider need to view or verify in order to ensure that the person requesting a transfer on behalf of the small business consumer is authorised by the legal lessee of the service to do so.

The TIO also suggests that clause 7.2 refer to 'informed consent' (as it does in clause 7.3), to ensure the meaning of obtaining a consumer's consent is clearly understood.

Case study 6 illustrates the importance of ensuring a consumer's informed consent to a transfer.

This case study illustrates that despite the current TCP Code being part of industry co-regulation since 2008, some providers may still be unaware of their obligations and responsibilities in ensuring that the consumer is clearly informed that by agreeing to a service means that the service will be transferred. In addition, this case study demonstrates that some providers may still be unaware that only the legal lessee or a person legally authorised by the legal lessee to give such consent can give informed consent to a transfer.

The TIO also suggests that specifying in sub-clause 7.2.1(a) of the draft TCP Code that the 'consumer who holds the telecommunications service' needs to be the legal lessee or a person who is legally authorised by the legal lessee to give consent, may reduce the number of complaints we receive about unauthorised transfers.

In addition, we suggest that a requirement is added so that when a consumer requests to nominate an authorised representative to act on their behalf, that service providers are required to tell the consumer what an authorised representative can and cannot do on their behalf. This may reduce the number of complaints that arise about unauthorised transfers.

3. What constitutes consent

We suggest that clause 7.3.1 of the draft TCP Code include a requirement that the consumer is told of the probable timeframe for completion of the transfer.

This could include the following information if the service provider's offer to transfer is unsolicited:

- (a) the Australian Consumer Law requires that a 10 working day cooling off period be provided
- (a) the transfer will not happen until after the expiry of the cooling off period
- (b) the cooling off period only starts after the written agreement is provided to the consumer – which the service provider has up to 5 working days to give to the consumer where the sale resulted from a telemarketing call.

We have seen instances where consumers mistakenly believe that a service must be disconnected with one provider before they can connect that same number with another provider. To address complaints about such issues, one suggestion may be that the draft TCP Code include a requirement that consumers be told by the gaining provider that they must not deactivate or disconnect their service prior to the transfer.

4. Consent – penalties and fees

We suggest that clause 7.3.1(g) in the draft TCP Code be broadened so that service providers are required to tell consumers of other penalties and fees that may apply as a result of changing service providers. We have seen instances of complaints about 'port-out fees' that a provider has charged when a consumer decides after some time that they want to transfer their service away.

One suggestion may be that the gaining service provider advise at point of sale if such a port-out fee exists and how much it may be, much the same as a provider must advise at point of sale about contract termination fees.

Another suggestion to avoid billing complaints that may arise as a result of a consumer changing service providers is for service providers to tell consumers that they may receive a final bill from the losing service provider, and to advise of any debt severance arrangements that are in place, so the consumer knows when they should expect to be billed for access fees by the gaining service provider.

5. Information about a transfer

As the Australian Consumer Law requires that a written copy of the agreement be provided to the consumer within 5 days if the contact from the service provider was unsolicited, we suggest that clause 7.4.1(c) in the draft TCP Code should include this additional level of detail to prevent service provider confusion.

6. Keeping records about transfers

As previously mentioned in relation to Chapter 4 of the draft TCP Code, the TIO expects providers to create and retain a recording of the entire conversation that took place between them and the consumer at the point of sale, not just the portion of the conversation in which the consumer supplied their agreement. Given the draft TCP Code's stronger commitment to informed consent and choice, one suggestion may be that the creation and retention of this more detailed record be included in clause 7.7 of the draft TCP Code.

In addition, the TIO notes that sometimes, point of sale records that are more than two years old are necessary to resolve consumer complaints. This is particularly common in relation to disputed default listings. We suggest that clause 7.7 of the draft TCP Code include a requirement that where a dispute arises after a transfer, the transfer records are retained for a minimum period of two years after the resolution of the dispute.

7. Consumers' right to rescind

The TIO notes that clause 7.10 of the draft TCP Code includes re-statements of the law and we note that this occurs in some chapters but not in others.

If the draft TCP Code is attempting to make it easier for service providers to understand their obligations under the new national consumer laws, then it follows that the law should be stated in other relevant areas of the draft TCP Code as well. For example, if Chapter 7 requires re-stating of the cooling off period obligations for unsolicited transfers, then Chapter 4 requires this as well for other types of unsolicited sales.

8. Sale of supplier's business or supplier re-organisation

In order to minimise complaints from consumers when there is a transfer of the consumer's service as a result of a sale of the service provider's business or re-organisation of its business, we suggest that clause 7.11 of the draft TCP Code include requirements to expressly inform consumers of all information pertaining to the new service provider's services, including pricing, terms and conditions, the impact of using existing equipment, and how and where the consumer can send a notice of termination.

Additionally, in the instance where a consumer decides that they do not want to transfer their service to the new service provider that has bought the customer base of the previous service provider, we suggest that provision is made so the consumer is able to end their contract without early termination fees or other detriment.

9. Unconscionable or unethical sales practices that re-emerge from time to time

The TIO's Systemic Investigations team has noted an upward trend in new complaints relating to transfers as a result of misleading point of sale advice or that were unauthorised. These issues relate to around 12 providers (and/or their sales agents) misleading consumers over which company they actually represent.

Typically in these types of complaints, a salesperson from a provider contacts a potential customer, advises that they are from the consumer's existing provider (appearing to know the consumer's usage) and then offers the consumer a better deal or upgrade. The consumer agrees to the new deal or upgrade, thinking that they are agreeing to this with their existing provider. The consumer only becomes aware that the provider is not who they thought they were once the transfer has been completed and they receive their first bill. The consumer is also not provided information about their cooling off rights or where this information is provided, the consumer may face difficulty in contacting the provider to cancel the service during the cooling off period.

We have received over 1,000 new complaints about this type of issue since January 2011. The volume of these complaints at present is gradually increasing and we continue to monitor this issue. We have also commenced potential systemic investigations in relation to several providers and communicated our concerns on our website⁸.

We note that this particular business practice re-emerges from time to time. We have seen such practices in the past target vulnerable consumers such as pensioners or consumers from culturally and linguistically diverse backgrounds who think they are speaking to their preferred/existing provider, and then find out much later that this is not the case. These consumers may experience higher bills or detriment due to loss of discounts with their preferred provider, as well as the frustration and inconvenience to have the unauthorised transfer reversed.

Whilst the TIO can and does help resolve individual complaints from consumers who seek our assistance and we can and do, through our systemic investigations process, assist a broader range of consumers affected by this type of practice, we are not in a position to prevent this type of practice from occurring in the first place.

We suggest that careful consideration be made as to how such practices can be prevented by the draft TCP Code. We further suggest that Chapter 7 of the draft TCP Code include the following requirements:

- the communication of offers, sales practices, advertising material and other information that a service provider needs to provide to the consumer before a transfer is effected, should also comply with the requirements in Chapter 4 of the draft TCP Code
- where the transfer involves consumers with different needs, the service provider should also comply with the relevant requirements in Chapter 4 of the draft TCP Code
- the entire sales transaction, if over the telephone, should be recorded
- the independent area within the service provider that verifies the transfer should review the entire voice recording of the sales transaction and not just the portion that confirms the transfer (where the point of sale conversation occurs via the telephone), before a transfer is verified/confirmed (clause 7.9.1 of the draft TCP Code).

⁸ Telecommunications Industry Ombudsman, Misleading advice of a provider's identity, <http://www.tio.com.au/members/member-news/misleading-advice-of-a-providers-identity>.

Chapter 8 – Complaint handling

The TIO's 'Resilient Consumer' report released in August 2011 highlighted the difficulties consumers may have when attempting to resolve complaints with their provider. This included the importance of service providers recognising complaints and that their response should reflect the Australian Standard (AS ISO 10002—2006) for Complaint Handling.

As such, it is particularly pleasing that a number of the TIO's suggestions and comments provided to Communications Alliance in May 2011 relating to Chapter 8 of the earlier draft version of the TCP Code have been fully or partially adopted. The TIO considers the improvements in this chapter will provide greater clarity for service providers and their customers on how a complaint should be addressed and resolved.

However, there were some key areas that remain unaddressed:

1. Chapter rules

The TIO suggests the removal of the rule which exempts service providers from acting in accordance with the complaint handling chapter where the complaint is made on behalf of a consumer by an entity that charges (excluding legal practitioners).

2. Record keeping

We suggest that clause 8.5.1 of the draft TCP Code also require a service provider to keep copies of correspondence sent by a consumer to the provider.

3. Processes for dealing with TIO complaints

There appear to be no requirements in the draft TCP Code about the processes the service provider needs to put into place to respond to and resolve complaints that are lodged with external avenues of dispute resolution including the TIO.

The TIO believes that this is an area that may warrant exploration and could include commitments such as availability of resources, training of staff, complaint handling processes, timely responses to consumers, timely responses to the TIO or other external body, when a complaint is raised by the consumer with these external parties.

Similar principles as that contained in clauses 8.1 and 8.2 of the draft TCP Code could also apply to these categories of complaints.

We also query whether there should be reference to the fact that Chapter 8 timeframes are distinct from those timeframes that apply when a complaint has come to the TIO. In this respect, for the benefit of new industry participants or those who do not have many complaints, it could be useful noting in the draft TCP Code that the TIO's timeframes must be observed.

Chapter 9 – Compliance and monitoring framework

As mentioned above, we welcome the inclusion of a dedicated chapter on compliance and monitoring in the draft TCP Code.

We understand that constituent documents are in the process of being developed in relation to the proposed Communications Compliance. These documents will be critical in assessing matters of independence and accountability for this new body, and will underpin the credibility of its work.

Some of the matters that these documents will need to address include:

- the formal organisational structure of Communications Compliance, including the roles of the Board, Committee and Executive Director
- identifying how Communications Compliance will be structured and funded, and how its independence will be maintained
- clarifying enforcement mechanisms and consequences of non-compliance, both with the Code rules and with Chapter 9 requirements
- clarifying whether there will be the expectation that even service providers who are non-signatories will comply with Code provisions, including Communications Compliance requirements
- identifying how targeted investigations would be funded
- clarifying how its work will be publicly reported, including matters such as whether any reports made by Communications Compliance to the ACMA should be published on Communications Compliance's website.

Other Issues

Service connections and fault rectification

As noted in our initial submission to the Steering Committee about the TCP Code Review in July 2010 and further outlined in our September 2010 submission to the ACMA's Public Inquiry on *Reconnecting the Customer*, we suggest the inclusion of minimum standards in the TCP Code for the connection or repair of services (other than standard telephone services) or equipment that is bundled with these services. We note that this suggestion has not been incorporated into the draft TCP Code.

With the increasing numbers of consumers favouring internet, mobile and other technologies over the standard telephone service to meet their telecommunications needs, the industry could take the lead in establishing in the draft TCP Code, minimum performance standards for the connection and repair of non-landline services including equipment faults and equipment provisioning delays.

Other possible omissions

We note that there is nothing in the draft TCP Code that addresses service provider obligations and more particularly, remedies for consumers due to:

- the incorrect quarantine of numbers
- the incorrect disconnection of services
- unauthorised transfers
- debt severance
- the cancellation of a consumer's service on the grounds that their TIO complaint renders the account 'financially unviable' for the service provider.

These are important issues that the TIO has previously raised as potential drivers of complaints and there is perhaps an opportunity to address these in the draft TCP Code.

Code review

We note that the proposed review of the new TCP Code is 5 years from its date of registration.

Given the substantial changes in the draft TCP Code when compared to the existing TCP Code, we suggest that consideration be given to a shorter timeframe for the review of the new TCP Code.

Transitional arrangements

We note that the draft TCP Code does not provide for transitional arrangements about existing Complaints or Complaints relating to events that occurred prior to the Code registration date, and what happens to these, upon registration of the new TCP Code.

The TIO believes that transitional arrangements would be useful for service providers and consumers, so that there is clarity around how Complaints will be handled once the new TCP Code comes into effect.

Appendix – Case Studies

Case Study 1: Systemic investigation about direct debiting and credit management practices arising from a pre-paid credit arrangement

The TIO's Systemic Investigations team investigated a provider's practices around the direct debiting and credit management of its customers who had signed up to a particular plan.

Under this plan, consumers were required to pay a monthly sum for a cap amount of included calls, along with an additional \$20 for going over the cap allowance (the 'pre-paid credit'). Where a consumer used more than their cap, the provider would debit this amount from the \$20 pre-paid credit.

From a number of the complaints received by the TIO, it was clear that some consumers believed that if they went over their cap in any one month, the provider would not debit more than the \$20 pre-paid credit. Consumers did not seem to be aware that the terms and conditions for the plan stated that the provider was able to debit a consumers' bank account an unlimited amount of times per month, above and beyond the \$20 pre-paid credit. This created problems for some consumers who believed that they had entered into a pre-paid plan, as they were not aware that although they were not in a contract, the provider had the ability to debit from their bank account at any stage for any excess usage.

While the provider argued that the plan was essentially pre-paid and therefore it was not required to meet certain requirements under the TCP Code, the TIO took the view that it was neither purely pre-paid nor purely a post-paid plan and as such, due to the features of the plan, it was important that the provider take the appropriate steps to ensure it was compliant with the relevant clauses of the Code.

While the TIO was largely able to resolve issues regarding point of sale advice and users gaining access to usage data, there were three outstanding issues that the TIO considered were indicative of potential gaps within the existing TCP Code. These were:

- (a) the notification to consumers of bank account debits for the pre-paid credit and excess usage
- (b) the notification to consumers of an impending restriction of a service
- (c) some elements of the provider's over-commitment policy.

With regard to (a), the provider proposed notifying the consumer of the specific amount of the debit if it was more than when the amount to be direct debited was less than \$150, but there was no commitment to a clear indication when the direct debit would occur. The TIO took the view that a provider should provide consumers with notification of any non-regular direct debit, at least 24 hours prior to the debit taking place, so that the consumer has an opportunity to verify the charges.

In relation to (b), the provider had restricted the consumer's service when it was unable to successfully debit the consumer's account for any excess usage charges past the pre-paid credit and no notification was provided to the consumer prior to this happening. The TIO took the view that the

provider restricting a consumer's service where it was unable to successfully debit a consumer's account was not consistent with the TCP Code.

In relation to (c), the TIO was of the view that the provider's over commitment policy presented two particular issues of concern:

- the provider had nominated an amount of \$400 as the touch point when it communicates a 'high usage' message to a consumer, and \$500 as the point at which it will bar a service to protect a consumer from over-commitment
- the provider took the position that the over-commitment policy will not apply to consumers with international roaming ability activated on their mobile services.

In this systemic investigation, the TIO recorded a number of confirmed code breaches on other issues, but could not do so in relation to the three issues above because of the lack of clear obligations in the current TCP Code.

Case Study 2: Informed consent, unfair sales practices, improper direct debits and a vulnerable consumer

The TIO's Indigenous Liaison team was contacted by the North Australian Aboriginal Justice Agency (NAAJA) on behalf of the consumer. The consumer was an Indigenous Australian living in a remote community whose only source of income was a disability pension. The TIO was advised that the consumer had limited understanding of commercial transactions outside her community and that she had been contacted by an overseas telemarketer on behalf of an Australian provider. Despite there being no mobile coverage in the consumer's area, she was offered a mobile service under contract.

The TIO was further advised that no terms and conditions were provided in relation to the contract.

While the service was used when the consumer went to Darwin and the bills were paid, she subsequently threw away the handset believing it did not work. Although the service was unused, the consumer continued to be direct debited each month causing her account to be overdrawn and dishonor fees to be applied by her financial institution. The service was eventually cancelled and the consumer received a demand for \$1,500.

The TIO was informed that NAAJA had contacted the provider, but was unable to obtain a copy of the verbal contract. After being referred by the TIO, the provider offered to cease the direct debit and waive \$1,200 of the outstanding amount. However, this was conditional upon a payment arrangement being made in relation to the remaining \$349 associated with the early termination fees.

Further, the provider refused to cover \$1,157 the consumer had incurred through the dishonor fees.

The TIO escalated the complaint after no response was received in the early stages of the investigation. While the provider did not respond to the TIO's questions relating to whether the

consumer had clear information about the product and did not retain records of the “basic details regarding the Consumer’s consent to the sale..”, it agreed to waive all outstanding charges and refund the \$1,157 incurred through the dishonor fees.

The TIO subsequently recorded a number of confirmed breaches of the current TCP Code relating to billing, credit management, general rules and complaint handling.

Case Study 3: Pre-paid services and inability to verify charges

TIO was contacted by a consumer who used a pre-paid mobile service and had authorised his provider to direct debit \$25 each time his account ran low. He also purchased \$10 data packs separately for internet usage and claimed to have been advised that upon exhausting his \$10 worth of data, his downloads would stop to avoid incurring excess usage charges. However, the consumer then found out that his account had been topped up with \$25 many times, and he later discovered that he had incurred excess charges for his data usage.

The consumer claimed that he was then advised by the provider that after using up \$10 worth of data, his mobile account was automatically debited for data charges. This caused frequent direct debits of \$25 from his credit card and he claimed that he did not receive any notifications for exceeding the included usage. The online usage meter available had a 48 hour delay and did not appear to be a correct indication of the charges that were incurred. He requested his provider to supply a record of his data usage for the last 12-16 months and received approximately 400 pages for one month alone and found this difficult to read.

His provider offered a \$200 refund but the consumer believed that he may have incurred charges which exceeded \$200.

The TIO raised the complaint with the service provider but did not receive a response. When the matter was escalated for conciliation, the provider responded by advising that as the consumer had not raised a specific billing dispute, its offer of a \$200 refund stood. The provider also advised that due to system limitations, it had issued the billing data to the consumer in the only method available to it. The TIO was informed that the consumer could use a specific number from his handset which would provide real time usage information.

The consumer decided to change providers and did not wish to pursue the complaint.

Case Study 4: Point of sale advice and excess usage charges for international roaming

The consumer contacted the TIO to advise that she had been with her provider for a number of years and was currently on a \$49 cap plan. She advised that she occasionally used mobile internet

but it had never resulted in any charges above the minimum cap amount.

Prior to travelling overseas, she called her provider and asked about international roaming. When this was activated she was told she would be sent an application that would allow her to monitor her spend. When she got overseas she found that the application did not seem to show any increase in her pre-bill spend. She expected her bill to be a few hundred dollars and was prepared for this.

However, upon returning to Australia, the consumer found her service was barred with \$3,723 outstanding, of which \$3,403 were data charges. She claimed not to have used data in any fashion except for occasional browsing and in a manner similar to what she normally did. She was advised by her provider that 231MB of the 240MB charged had occurred on the second day she was overseas, but she has not been provided any clearer billing detail to be able to verify how this occurred.

The consumer claimed not to have been informed by her provider prior to leaving Australia whether roaming data was excluded from her normal data allowance or that data would be charged \$15 per MB. In order to have her phone reactivated, she paid \$3,000.

After the TIO raised the complaint with the provider, it responded advising that it would refund \$3,157 of the disputed charges. The provider did not offer any explanation as to whether the consumer was provided with sufficient information regarding using her service overseas or whether the charges were in fact correct.

The consumer accepted the resolution of the complaint. The TIO subsequently recorded a confirmed breach of clause 6.4.1 of the current TCP Code.

Case Study 5: Adequacy of supplier credit control tools to reduce consumer's exposure to financial over-commitment

The TIO was contacted by a consumer who had taken up a mobile service under contract. At the time the service was agreed to, the consumer's only source of income was derived from Centrelink benefits and the provider was informed of this at the point of sale, but advised the consumer that this would not be an issue. The consumer was placed on a \$49 cap plan and believed that this would be the maximum amount required to be paid each month. The consumer subsequently incurred almost \$5,500 in usage charges and subsequent cancellation fees over approximately six months. The consumer was default listed when the service was cancelled.

The provider advised the TIO that approximately one month after the service was connected, it contacted the consumer and placed him on a \$129 cap plan due to his high usage. The consumer's first invoice was \$1,859. The provider took no further steps to manage the consumer's exposure to financial over-commitment.

The TIO took the view that the provider's response to the consumer's usage was not reasonable on the basis that it allowed the consumer to accumulate a high bill over a short period and then responded to this by upgrading the cost of his plan. The TIO advised the provider that in allowing the

consumer's debt to increase to around \$5,500 over a short space of time indicated that it may not have had adequate processes in place to manage its customer's expenditure.

While the provider did not respond to the TIO in relation to the adequacy of its expenditure control tools, it offered to waive the debt in its entirety and remove the default listing. The TIO subsequently recorded a confirmed code breach of clause 7.3.4. of the current TCP Code.

Case Study 6: Informed consent and transfers

The consumer contacted the TIO advising that while he was the owner of a business, his manager was contacted by a provider offering a new service. The manager requested the details of the offer in writing, but a few weeks later, they received an invoice from the provider.

When the business owner queried the invoice, the provider advised that the business owner's manager had agreed to the new contract and that the business was required to pay the invoice before a reversal would be actioned. The manager was neither the legal lessee of the service nor a legally authorised representative. The consumer sought the removal of any charges incurred.

The provider contacted the TIO advising that it had a verbal recording with the manager agreeing to transfer the service. The TIO explained that if the manager of the business was neither the legal lessee nor the legally authorised representative, then the transfer should not have occurred and the charges should be waived.

The provider indicated to the TIO that it was unaware of this 'rule' but agreed to waive the charges incurred and arrange the reversal of the transfer.

The TIO subsequently recorded a confirmed code breach of 8.1.3(d) and (e) of the current TCP Code.