Submission to the 2023 Review of the Telecommunications Consumer Protections Code

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1. Introduction

I welcome the opportunity to submit a response to the Discussion Paper (Paper) for the 2023 Review of the Telecommunications Consumer Protections Code (TCP Code or Code). I do so as an Honorary Life Member of Communications Alliance.[1] I attended my first meetings of CommsAlliance (then known as the Australian Communications Industry Forum) in 1997, representing Austar. I continued my involvement as Regulatory and Corporate Affairs Manager at Hutchison Telecommunications (1998 to 2000) and AAPT Ltd (2000 to 2007)[2]. In addition, I served on the Board, Chaired the Consumer Reference Panel, and participated in many other committees and processes.

I have not been directly involved in the industry in any capacity since 2014 when I left the office of Jason Clare, then Shadow Minister for Communications. Before that, I spent sixteen years at Telstra, starting in a front-line customer service role and ending with General Manager roles in corporate sales and strategy. I then was employed in regulatory roles at Hutchison, AAPT and Unwired, a short contract at the Department of Broadband, Communications and the Digital Economy, and a year and a half as special adviser and speechwriter to Senator Conroy as Minister of that Department. Finally, I was Senior Economist at Energy Consumers Australia from 2015 to 2020. In 2020 I "retired", though I have remained active in energy consumer advocacy through the Network of Illawarra Consumers of Energy.[3]

In making this submission, I make no claims to special insights into key concerns and priorities that stakeholders may have about the Code. I do, however, feel that the review could benefit by being informed by a little history of the development of the Code (at least from one person's perspective). Additionally, the issues confronting telecommunications consumers are similar to those confronting energy consumers. These include the vexed question of the necessary protections to enable consumers to have ongoing access to "essential services"[4] and the specific actions necessary to care for vulnerable consumers.

The submission will begin with a review of the telecommunications regulatory regime. It is common to refer to the industry's co-regulatory arrangements, as the Paper does, though the term appears nowhere in the legislation or other foundational documents. The difference is more than semantic.

A brief history of the development of the TCP Code and related matters follows this review. The history is more a personal narrative than a complete review. The history intends to show the ongoing tension between regulators, consumer advocates and industry grounded in significant philosophical differences about the operation of markets.

After highlighting the philosophical differences, the submission will introduce a proposition about the role of consumer protections in a market economy. This section will analyse the Australian Communication and Media Authority's (ACMA) assumptions in its 2011

[1] https://www.commsalliance.com.au/about-us/membership
[2] The businesses of both these organisations eventually wound up in TPG.
[3] nice.org.au
[4] "Essential services" has been placed in quotes only to note that the phrase has a different meaning in access regulation.

Reconnecting the Customer inquiry and its 2023 *Financial hardship in the telco sector: Keeping the customer connected report*.

The following section contains suggestions for where the industry and the ACMA should concentrate on improving outcomes for telecommunications service consumers. Responses to the consultation questions and a short conclusion then follow.

Overall, my conclusion is that there are far higher priorities for the regulators and industry to address to promote the long-term interests of consumers than a revision of the TCP Code. First and foremost is an acceleration of efforts to disrupt scam business models and to make successful prosecutions. Secondly is the need for better information for consumers about the customer service quality of different providers. This can be partially achieved by developing the "complaints in context" data.

2. Understanding the Telecommunications Regulatory Regime

The Paper starts by making two declarative statements, being:

> *Consumers of communications products and services in Australia are protected by federal telecommunication-specific legislation and regulation, and by general consumer laws at both a federal and state level.*
>
> *Co-regulatory arrangements facilitate the objectives of federal legislation through registered and enforceable industry Codes developed under Part 6 of the Telecommunications Act.*

These deserve further analysis. The first statement is undoubtedly true, but the Paper doesn't address why industry-specific consumer protections are required. An analysis of this question prompts consideration of whether remedies for any perceived failure in consumer protections are best addressed through industry-specific provisions, general consumer law, or other measures. This will be explored in the fourth section of this submission.

The second statement describes the regulatory regime as "co-regulatory". This description has, at the instigation of the regulator (then the Australian Communications Authority), become common usage. However, it is not supported by an analysis of the legislation. Section 4 of the *Telecommunications Act 1997* (TA) is headed *Regulatory Policy* and states:

> *The Parliament intends that telecommunications be regulated in a manner that:*
> *a. promotes the greatest practicable use of industry self-regulation; and*
> *b. does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;*
> *but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.*[5]

Regulatory policy is directed at those who implement policy, that is, regulators. There can be no doubt that this was the intent of the legislation, as the Explanatory Memorandum states:

> *The Bill also contains a statement to the effect that the Parliament intends that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the industry, but does not compromise the effectiveness of regulation in achieving the objects of the legislation (see clause 4).* ***This is intended to guide the telecommunications regulators*** *in the performance of their functions and the exercise of their powers. (emphasis added)*[6]

The Act (in part 6) also provided for the making of industry codes and the provision that the ACA could register those codes and that the ACA could direct a participant to comply with a registered code. However, as the Explanatory Memorandum concerning s4 makes clear, the application of codes was subject to the regulatory policy.

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[5] http://classic.austlii.edu.au/au/legis/cth/consol_act/ta1997214/

[6] The Parliament Of The Commonwealth Of Australia House Of Representatives Telecommunications Bill 1996 Explanatory Memorandum Volume 1 available at http://www.austlii.edu.au/au/legis/cth/bill_em/tb1996224/memo1.html

> *This regulatory policy is intended to give guidance to the Minister, the ACA and the ACCC in the exercise of their powers and functions under the proposed Telecommunications Act. The regulatory policy will be important, for example, in guiding the exercise of powers and the performance of functions relating to industry codes and industry standards (Part 6), technical regulation (Part 21) and numbering and electronic addressing (Part 22).*

The Explanatory Memorandum does, however, add weight to the argument that the Parliament expected that Codes would be registered:

> *This Part sets out arrangements for industry codes and industry standards as part of a predominantly self-regulatory framework for the telecommunications industry. Many of the matters addressed by such codes will be of interest to consumers, but they may relate to many other matters. This Part extends light-touch regulation into areas which are currently not regulated and is an important contribution to improving consumer protection. The implementation of the arrangements is expected to develop over a number of years, as will the range of matters covered by industry codes.*
>
> *The proposed arrangements will be based on industry sections developing codes and registering them with the ACA. The ACA will be provided with safety net powers which may be used if self-regulation in an industry section has serious failings. This is similar to the approach to codes of practice taken under the Broadcasting Services Act 1992.*

Comparing the arrangements to the *Broadcasting Services Act* (BSA) reveals significant differences, not least being the specificity with which the two Acts detail the expected content of codes (s113 of the TA vs s123(2) of the BSA). The second difference is that the telecommunications industry had to develop codes that affected parts of the multi-carrier and service provider environment (such as preselection).

Certainly, consumer groups and the ACA believed that the industry needed to develop codes on all the matters of particular concern to consumers and that these codes needed to be submitted for registration. At this point, the ACA referred to the arrangements as "co-regulatory". In addition, the ACA took the view that it would not register a Code if the provisions of the Code were not specified in such a way that the ACA could easily determine if the Code was being complied with. This view is, in my opinion, in contradiction with the specification of the matters the regulator can consider before it **must** register the code under s117. This is an important point; the ACA inserted itself into the Code arrangements beyond its remit.

The Paper (paras 3.8 and 3.9) outlines the matters the ACMA has decided need to be considered. Technically the ACMA's role in cases of codes of "substantial relevance" is limited to the assessments in s117(1)(d)(i), which is that the ACMA is satisfied "the code provides appropriate community safeguards for the matters covered by the code." The

ACMA, in its *Guide to developing and varying telecommunications codes for registration,*[7] asserts that the simple word "appropriate" can be expanded to cover:

- consistency with legislation
- enforceable provisions
- satisfactorily considered substantive issues raised during consultation
- how the code will be administered, including implementation mechanisms, complaints-handling processes, compliance monitoring and how non-compliance is addressed.

Similarly, in describing the "public interest test" provided in s112, the ACMA underplays the significance of the phrase " without imposing undue financial and administrative burdens on participants in the telecommunications…." As we have already noted, the import of this consideration is not that shareholders bear the costs of regulation; consumers do.

Part 6 of the Act does not refer to the industry's rights when the regulator declines to register a Code; however, the Explanatory Memorandum does so, noting, "A decision to refuse to register a code is subject to merits review under Part 29 of the Act (see Schedule 4)." Part 29 establishes the procedure for the regulator to be asked to reconsider its decision, after which an application can be made to the Administrative Appeals Tribunal for a review of the decision. Schedule 4 lists the matters subject to the Part 29 review procedures and includes the regulator's refusal to register a code.

While the industry could have tested the ACA's power to refuse to register codes, they didn't. Whether this was an active choice after analysis of the option or just passive acceptance is unknown. Remember that regulation was still a relatively new construct in the late 1990s for all the participants in the industry. However, it remains an option if the industry develops a code that the regulator is inclined not to register (a situation that did occur previously).

The distinction between self-regulation, enforced self-regulation and co-regulation was more completely explored in my 2010 research paper *Self-regulation in telecommunications didn't fail -it was never really tried*.[8] Telecommunications was not the only sector pursuing self-regulatory outcomes. Fiona Simon, in her book *Metaregulation in Theory and Practice,* [9] identified two causes of the failure of self-regulation in the development of the retail energy market; the inability to define a single "public interest" to work towards and the political process, in particular, the need for Ministers to be "seen to be doing something". She summarises this as:

> *This book has explored whether a clear sense of the public interest (the interest that regulation was designed to serve) developed over time in the Australian retail energy industry. The key question for this exploration relates to what the industry observed:*

[7] https://www.acma.gov.au/sites/default/files/2020-09/Guide%20to%20developing%20and%20varying%20telecommunications%20codes%20for%20registration.pdf

[8] https://www.researchgate.net/publication/370762003_Self-regulation_in_telecommunications_didn't_fail_-it_was_never_really_tried

[9] Simon, FC 2017, *Meta-Regulation in Practice : Beyond Normative Views of Morality and Rationality*, Taylor and Francis.

> *Was the industry enabled and incentivised to self-- regulate to meet the public interest as expected by normative meta-- regulatory theory? The short answer is 'no'.*
>
> *Normative meta-- regulatory theory anticipates that inclusion of more stakeholders in regulatory policymaking and enforcement will help regulators and regulated industries better meet the public interest. What happened instead in the Australian retail energy sector was that every decision became contested and politicised. There was no single public interest or, in other words, no clear set of moral outcomes or norms for industry to work towards. Stakeholders were also not oriented towards reaching consensus, and consensus only became more remote the more that discussions on controversial issues occurred and new risks were discovered. The signals that retailers were to rely on to determine appropriate self-- regulation were lost in the political clamour between stakeholders, and the industry was not programmed to absorb and learn from political messages in any event. Further, the reputation mechanism as a form of regulation was unreliable. Not only did most consumers tend to respond to price only (and were not predictably rational in doing this) but the messages to the community about business behaviour were skewed and inconsistent, meaning that even consumers who might conceivably have changed their purchasing decisions based on their view of the integrity and compliance of a company were not given the appropriate or correct information to act upon.*

This inability to agree on the "public interest" can be illuminated by a simple example. Many (if not most) regulatory schemes include an objective of promoting economic efficiency. In a presentation to The Regulatory Policy Institute's 2017 Annual Competition and Regulation Conference[10], Ofgem's then Executive Director, Systems and Networks (now CEO) Jonathan Brearley observed (in the context of network price controls) "Fairness a big issue -- Wide-ranging discussions on fairness".[11]

Subsequent discussion of the assembled regulators, lawyers, economists (and a consumer advocate from Australia) identified four different concepts of fairness. A fair outcome can be one in which each consumer pays:

- according to the costs their behaviour imposes on the system,
- the same price,
- the amount they are prepared to pay, or
- the amount they can afford to pay.

The first aligns with economic efficiency, the second is the arrangement often referred to as "postage stamp pricing,"[12] and the third is the pricing in first-order price discrimination (as occurs in any price haggling scenario).[13] The last is typically only implemented through

[10] http://www.rpieurope.org/media/programmes/RPI_2017_programme.pdf
[11] http://www.rpieurope.org/media/publications/BrearleyJ.pdf
[12] As a matter of history, however, the original penny post in the UK was actually an economically efficient approach when compared to the system in France as beautifully described in Bastiat, F 1873, 'The Salt-Tax, Rates of Postage, and Customhouse Duties', in his *Economic Sophisms* https://www.google.com.au/books/edition/Economic_Sophisms/MocBAAAAQAAJ
[13] At least some of the cases of energy consumers not choosing the best price contract is a case of imperfect first order price discrimination – that is, some consumers who can afford are prepared to pay the higher price over engaging in costly search.

transfers based on progressive taxation (though in the US State of California, there are currently proposals to charge electricity access based on capacity to pay[14]).

I will return to these conceptions of fairness in considering the ACMA's recent report on financial hardship, noting that expecting other energy consumers to fund the energy needs of consumers facing hardship may appear "fair" in an interpretation of the second definition of fairness but is highly unfair in terms of the other definitions.

Finally, we return to the regulatory policy included in the TA. The second limb of the policy intent, after self-regulation, is that the Parliament intends regulation to not impose undue financial and administrative burdens on participants in the industry. This phraseology often leads consumer advocates to conclude that this is a concession to the industry as if money not spent on regulatory compliance flows to profits. This is clearly not the case in competitive markets (where prices are set equal to full marginal cost) or even monopoly markets (where prices are set by a markup on full marginal costs determined by the elasticity of demand). Consumers always bear the full cost burden of regulation through higher prices.

In summary, describing the regulatory framework as co-regulatory is a misinterpretation by the ACMA of the legislative provisions designed to guide the regulator. The industry's acceptance of this mischaracterisation has always been an error. It has permitted an activist regulator to seek to extend the scope of industry-specific regulation to the ultimate detriment of consumers by increasing costs to providers.

In 2011 the ACMA produced it's *Reconnecting the Customer* report, which was highly critical of the overall level of customer service from telecommunications providers. The approach to this review and the resolution in favour of a Code revision is addressed in the next section.

[14] https://www.canarymedia.com/articles/energy-equity/income-based-electric-bills-the-newest-utility-fight-in-california

3. The History of the TCP Code

Before the TCP Code

As mentioned in section 2, with the encouragement of the ACA and Consumer Groups, ACIF started to develop a series of Consumer Codes soon after its creation that addressed specific line items included in s113 of the TA. This process differed dramatically from the broadcast industry, where each industry sector wrote its own code of practice covering all the elements of s123(2) of the BSA relevant to it).

The naivety of these codes is reflected in the drafting, which talked about industry participants as "C/CSPs", meaning "Carrier or Carriage Service Provider", without recognising that the entities that were Carriers were only relevant in these consumer-facing Codes because the entities were also Carriage Service Providers. The naivety was further compounded by ACIF striking an arrangement with Standards Australia for publishing codes that required payment to receive a copy.

The second iteration of these codes at the start of the millennium adopted the use of "Supplier" as the generic term for the active party. However, there were still separate codes for Customer Information on Prices, Terms and Conditions (ACIF 521:2004)), Credit Management (ACIF 541:2006), Billing (ACIF C542:2003), Consumer Contracts (ACIF C620:2005), Customer Transfer (C546:2007) and Complaint Handling (C547:2004). At the Consumer Codes Reference Panel, consumer advocates (notably Charles Britten of the Australian Consumers Association – now known as CHOICE) proposed that consumers would be better served by a single consumer code that adopted a lifetime journey approach to how these codes provided additional protections to consumers.

The first Telecommunications Industry Ombudsman, John Pinnock, supported the proposal. He frequently noted that a right unknown was a right denied. His point was that the description of the requirements of the Code needed to be in language that would enable a consumer to judge whether their experience reflected the code provisions.

Industry members of the Reference Panel resisted this suggestion claiming that the task would be too hard and that the functionally oriented codes facilitated implementing code requirements in their organisations. To address the first concern, the Regulatory Manager at AAPT, Robyn Ziino, working at my direction, drafted a complete single consumer code based on all the existing content.[15]

The first TCP Code

At this point, I left AAPT and all my roles at CommsAlliance. My understanding is that the relationship with consumers was at a particular low at this point. The then CEO of CommsAlliance decided to pursue a different strategy to develop the first TCP Code (C628:2007), which replaced the six codes referred to earlier. A committee did not draft it, instead being contracted out to a lawyer for drafting under instruction from a Steering Committee headed by Deirdre O'Connor. Guidelines accompanying the Code assisted compliance.

[15] At the time of writing I do not have a copy of this draft but am endeavouring to find one.

Overall, this version of the Code did not successfully address the issues consumers raised. The fact that each section included its own objects clause made the code feel more like a compilation of different codes rather than a single code. In addition, many of the clauses were redundant. An example is clause 3.4.1 "A Supplier must comply with all applicable laws in dealing with Customers." This clause created no new obligation on Suppliers but also provided no assistance to consumers in understanding their rights. The next clause requiring Suppliers to ensure that Sales Representatives do not engage in unconscionable conduct is similarly vacuous. Ultimately this attempt at a single consumer code was deemed a failure.

In 2011 the ACMA produced the report from its *Reconnecting the Customer* inquiry[16] , which identified four common problems:

- Customers found it difficult to contact their service provider, particularly by telephone.
- Customers found it difficult to have problems resolved in the time they expect, especially for bills.
- Customers received contrary and inconsistent advice about services.
- Customers frequently experienced "bill shock".

The ACMA identified five main causes of these problems:

- While most consumers saw price as the main factor when choosing a service, the advertising and marketing of plans did not make it clear how prices inside a plan were calculated.
- Providers used words such as 'cap' to describe a plan for which the advertised amount was, in fact, the minimum amount charged each month.
- Products and services were becoming more complex, with the implication that some of this complexity was intentional to obfuscate.
- Consumers cannot compare the quality of customer care offered by different telecommunications providers before they choose a plan and so cannot use this as a basis for their choice.
- Customer service representatives frequently failed to recognise when a customer was making a complaint or escalate complaints to the right level.

In releasing the report, the ACMA advised they had identified changes they thought necessary to the TCP code and indicated that if industry did not make those changes, the ACMA would consider options of making its own code. It is worth noting that legislative changes had recently made the process for the ACMA to substitute regulation for an inadequate code easier.[17]

The lead consumer advocacy organisation ACCAN took a particularly strident view of industry responses to the ACMA's draft report as part of the inquiry. CEO Theresa Corben said :

> *We're quite surprised, given the threat made by the regulator to regulate if the industry failed to deliver on certain non-negotiables, that the industry hasn't offered*

[16] Op cit. I was engaged as a consultant by the ACMA as part of the inquiry to provide a report on *Unit Pricing for Telecommunications Services.*
[17] https://www.theregister.com/2011/09/08/acma_cracks_down_on_crap_carriers/

> *up anything substantive to address the ACMA's concerns. Instead, they've tinkered with and pointed to their voluntary Code as a solution. The current TCP Code has categorically failed to address basic levels of customer service and complaint handling, and indeed during the course of this inquiry, complaints to the Ombudsman have risen to record highs. It's very hard to believe that a revised Code alone will produce a different result. The industry has been told major change is needed, yet they come back and say it's too expensive and too hard to fix the problems. It's very disappointing.*[18]

The industry did pay heed to these criticisms and incorporated in its rewrite of the TCP code the compliance regime known now as Communications Compliance.[19]

The 2012 TCP Code

Despite these efforts, and emboldened by the calls from ACCAN, CALC and others, the ACMA indicated that it might reject the new code being drafted by Communications Alliance.[20] Having already consulted to both the ACMA and Communications Alliance, by the stage the ACMA Chair was making these comments, I was employed in the office of Senator Conroy. I took the opportunity after Senate Estimates in May to comment to the ACMA Chair that the Minister might not regard rejecting the Code and replacing it with regulation as a "win" and encouraged him to seek the views of the Minister before acting.

Of course, the Minister could not direct the Chair on this matter. But meetings between the Minister and the Chair identified the value of the Minister facilitating three-way discussion between Communications Alliance, ACCAN and the ACMA.[21] These facilitated discussions resulted in all parties agreeing on a revised code (C628:2012). In September, after the Code's registration, further legislative change boosted the ACMA's powers of direction over code compliance.[22]

The Code underwent a full review in 2015 that amended the Code's customer information provisions and removed Code rules that duplicated legislative provisions. Minor variations occurred in 2016 (amending Chapter 9 – code compliance and monitoring), 2017 (financial hardship and domestic violence), and 2018 (to clarify interaction with the ACMAs Telecommunications (Consumer Complaint Handling) Industry Standard 2018. The Code was again reviewed in 2019. All Chapters and appendices were revised to improve readability, align with current regulations and technology, and reflect consumer needs, except the Chapter on Code Compliance and Monitoring, which was only reviewed for editorial changes.

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[18] https://accan.org.au/component/content/article?id=349:industrys-tinkering-with-

[19] I was engaged as a consultant by CommsAlliance to provide advice on the design of Comms Compliance and also to conduct training on the unfolding TCP Code.

[20] https://www.arnnet.com.au/article/421877/

[21] Having previously been contracted by both the ACMA and CommsAlliance in relation to the code I was not included in these discussions. I have no detailed recollection of what matters were contentious nor how they were resolved.

[22] https://www2.computerworld.com.au/article/435488/tcp_compliance_could_reduce_telco_market_acma_says/ and https://www.smh.com.au/business/acma-armed-to-punish-poor-service-telcos-20120905-25dob.html

While the 2007 version included Guidelines for complying with the code, the 2019 version references seven other CommsAlliance documents (described variously as guidelines or guidance notes).

The Minister for Communications, Senator Fifield, in December 2017 directed the ACMA to make a standard about certain NBN-related issues and included a complaints handling standard in the direction.[23] These directions followed a 2016 research report by the ACMA into NBN customer migration experience[24] and further research commissioned by the ACMA for the Minister in August 2017.[25] The choice of using the regulator to sort out issues that fundamentally revolved around the ways that NBN Co engaged with and supported retailers reflected how little direct control Ministers have been able to exert over operational NBN decisions.[26]

In my opinion, it is unfortunate that the Minister invoked his power to direct the making of the standard. Having not been involved, I do not know whether CommsAlliance was given the opportunity to develop a code. I do know from my earlier experience that NBN Co did not fully embrace the self-regulatory framework, and ultimately this was a deficiency in the establishment of NBN Co.[27]

The current code review seems to have been brought forward due to the recent ACMA report on vulnerable customers. We will address that in the context of the role of consumer protections in a market economy in the next section.

[23] Media Release https://webarchive.nla.gov.au/awa/20180122133053/http://pandora.nla.gov.au/pan/154916/20180123-0000/www.minister.communications.gov.au/mitch_fifield/news/boost_to_broadband_consumer_protections.html
Direction https://webarchive.nla.gov.au/awa/20201115123709/https://www.legislation.gov.au/Details/F2017L01711/Html/Text

[24] https://webarchive.nla.gov.au/awa/20170423173315/http://acma.gov.au/theACMA/migrating-to-the-nbn-the-experience-of-australian-consumers and also https://www.zdnet.com/article/acma-to-look-into-nbn-customer-woes/

[25] https://webarchive.nla.gov.au/awa/20170423173315/http://acma.gov.au/theACMA/migrating-to-the-nbn-the-experience-of-australian-consumers

[26] For earlier examples see https://www.innovationaus.com/stephen-conroy-a-man-of-faction/

[27] In fairness to the Ministers who gave NBN Co its first statement of expectations I don't think it occurred to them that NBN Co might seek anything other than highly cooperative arrangements with service providers.

4. The Role of Consumer Protections in a Market Economy

General consumer protection

Australia's formal embrace of competition policy and the centrality of markets began with the Whitlam Government and the *Trade Practices Act 1974*. The bill strengthened prohibitions on restrictive practices and introduced consumer protections. In the second reading speech, Kep Enderby said:

> *The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices. Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries.*
>
> *In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as* caveat emptor *- meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.*[28]

The Bill very specifically addresses the issue of consumer protections from the position of the imbalance in the positions of consumers and suppliers. Market theorists recognise that markets don't efficiently allocate economic resources if consumers are ill-informed.[29] From the government's perspective, consumer protections are part of the first version of fairness that equates to market efficiency. They are not designed to replace the market or shield the consumer from the market.

To fulfil their objective, consumer protections must give consumers confidence to participate in the market. Consumer protections aren't, of course, new. One of the most fundamental consumer protections is the standardisation of weights and measures so consumers can know how much of something they are being offered at the quoted price.[30] Contract law is part of

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[28] https://parlinfo.aph.gov.au/parlInfo/genpdf/hansard80/hansardr80/1974-07-16/0078/hansard_frag.pdf;fileType=application%2Fpdf

[29] "Market failure can also occur when consumers lack information about the quality or nature of a product and so cannot make utility-maximising purchasing decisions" Pindyck, RS & Rubinfeld, DL 2001, Microeconomics, 5th (International) edn, Prentice Hall P.294

[30] Clause 35 of the 1215 version of the Magna Carta established "There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russet, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly." https://www.bl.uk/magna-carta/articles/magna-carta-english-translation

consumer protection (the vendor who has made an offer and accepted the consideration I propose must provide the goods or services offered).

General consumer protections have been increased since 1974 to include unconscionable conduct and unfair contracts. There is now active consideration of including unfair practices in the prohibitions. The ACCC recommended including some unfair practices in Australian Consumer Law in recommendation 21 of the *Digital Platform Inquiry: Final Report.*[31]

In researching digital platforms and unfair trading practices, the Consumer Policy Research Centre[32] identified three categories of unfair practices in digital markets:

1. Firms inducing consumer consent or agreement to data collection through **concealed data practices**
2. Firms using opaque data-driven targeting and interface design strategies to **undermine consumer autonomy**
3. Firms having data practices that, by design or indifference, lead to or increase risks of **consumer vulnerabilities being exploited.**

In explaining why the existing prohibition on misleading and deceptive conduct doesn't cover these practices, the CPRC notes, "the prohibition would very rarely impose a positive duty on the firm to disclose information about its practices, even where the firm's practices have significant and negative consequences for the consumer." The statute specifically states that a failure to provide information can be misleading or deceptive conduct. The issue isn't what the law says but how the courts have interpreted it.

The calls for the inclusion of a prohibition on unfair practices are based on the interpretations of Australian courts of the existing prohibitions on misleading and deceptive conduct and unconscionable conduct.[33] A very simple example is in a judgement on an injunction sought by Optus over Vodafone's use of the word 'infinite' to describe a plan. In declining the injunction, Justice Nicholas wrote:

> *It also needs to be remembered that ordinary and reasonable consumers, who might be expected to take some care of their own interests, are likely to do more than simply rely upon these particular television commercials in deciding whether or not to sign up to the respondent's plan. These types of plans typically involve a contractual commitment of a year or more in duration and are invariably the subject of terms and conditions which relate to matters of detail of the kind that the applicant's complaints focus upon.*

The court's reliance on an "ordinary and reasonable consumer" standard effectively collapses all the well-meaning statute into little more than "caveat emptor". The consumer is expected to do more than rely upon the advertisement. When applied to digital platforms, similar legal

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[31] ACCC 2019 *Digital Platforms Inquiry: Final Report* https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

[32] CPRC 2020 *Unfair Trading Practices in Digital Markets-Evidence and Regulatory Gaps* at https://cprc.org.au/wp-content/uploads/2021/11/Unfair-Trading-Practices-in-Digital-Markets.pdf

[33] For a good review see Paterson, JM & Bant, E 2021, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online', *Journal of Consumer Policy*, vol. 44, no. 1, pp. 1-19 available at https://link.springer.com/article/10.1007/s10603-020-09467-9#citeas

reasoning, even were the prohibition on unfair practices, would lead to the conclusion that consumers shouldn't just click agree but should read all the contractual terms.

In short, adding extra consumer protections in the statute isn't the solution. The courts must be instructed (by statute) to move away from the ordinary and reasonable person standard.

Industry-specific consumer protection

The question arises of why there are any industry-specific consumer protections. There are at least two bases for industry-specific protections. The first is if the nature of the goods or services is particularly hard for the consumer to assess, and the second is if the goods are considered an "essential service". The latter term is used differently in economic regulation, where it refers to a service necessary in producing other goods and services instead of a necessity of life.

What defines a necessity of life is, of course, a social construct. In 1975 only 62% of homes had telephones. The essential telecommunications services were access to public phones and the ability to receive telegrams.[34] By the 1990s, considering the fixed-line phone an essential service was reasonable. These days access to a mobile phone and the internet is effectively essential; it is very hard to seek employment without them.

The additional characteristic is the restricted nature of supply. This second characteristic adds the need for a "must supply" condition on at least one provider. This condition is really the significance of the essential service nature. Food, by contrast, is essential but is available from many sources, and there is no regulated condition that a provider must make supply available.

A particular problem of "must supply" provisions is that they don't work well with promoting consumer choice. If only one supplier is designated as the default (universal service) provider, they complain about the added burden and want a subsidy; if all suppliers carry some default burden, then all suppliers must be subject to service quality regulation around the service that must be supplied (the standard contract in energy regulation).

In practice, all goods and services suffer from the first consideration, the inability of consumers to fully assess the product. For this reason, there are industry-specific safety regulations on many products, including food, electricity, toys, cars, telecommunications and more.

Unfortunately, the widespread prevalence of safety regulations has a cost: consumer reliance on the regulatory framework. This reliance occurs primarily with consumers not making rudimentary checks to ensure the regulation is complied with. This reliance is particularly the case where the protections prohibit certain activities but don't require attestation that a product is safe. For example, toys with small parts that are easily swallowed are being marketed for under three-year-olds, and consumers are not checking.

Consumers in telecommunications (and other liberalised industries) had historically only been able to acquire the service from a single government-owned supplier. In Australia, that supply was buttressed by the existing Commonwealth Ombudsman scheme. As the TA

[34] See *Telecom's First Ten Years 1975-85* at http://www.digecon.havyatt.com.au/docs/0026.pdf . I received notification of my first job in 1979 (with Telecom) by telegram.

reveals, it was a common perception that consumers would require some protection in many areas to replicate previously available protections.

There is a stark contrast between the device markets and the two essential telecommunications services they are required for. Mobile phones and personal computers are subject to certain electrical safety and radiocommunications safety and interference standards but otherwise face no industry-specific regulation. Mobile handsets are frequently bundled with the service and collect some obligations by virtue of being under the same contract. Still, it took the TIO some time to get coverage of handset issues within these bundled contracts.

The question that goes unanswered in these considerations is whether there is a need for industry-specific protections or an extension of general consumer protections, as suggested for digital platforms with a general extension to unfair practices. To this should be added the option of leaving the prohibition unchanged but providing specific directions to the courts to apply a standard other than the "reasonable and ordinary person".

The ACMA's concerns

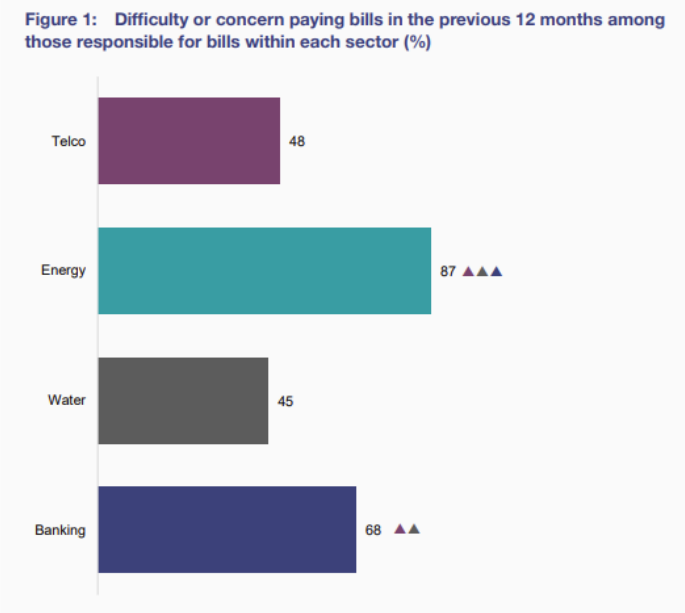
As mentioned above, the ACMA has at least twice researched consumer experiences and concluded the need for tighter additional industry-specific protections. The earlier *Reconnecting the Customer* inquiry was addressed in section 2. It appears that the issues causing the ACMA concern have mostly been resolved through the revised Code adopted in 2012.

The ACMA's most recent review is *Financial hardship in the telco sector Keeping the customer connected* referred to in the introduction. The ACMA says this review will inform its position on the Code review.[35] The ACMA's position is based on a quantitative consumer research project. It draws heavily on comparisons between the number of survey respondents saying they had experienced difficulty paying their telco bills with the number of customers enrolled in financial hardship programs. This comparison is completely misleading, as the former is a far lower threshold than "financial hardship". It is, quite simply, the difference between something being difficult and something being impossible.

The ACMA also concludes that information provision isn't working effectively because consumers experiencing hardship were unaware they could contact their provider for help. A better test is how prominently information could be found on provider websites if consumers sought it. My research of the three leading providers found information on the home screen that took me fairly quickly to details on seeking assistance.

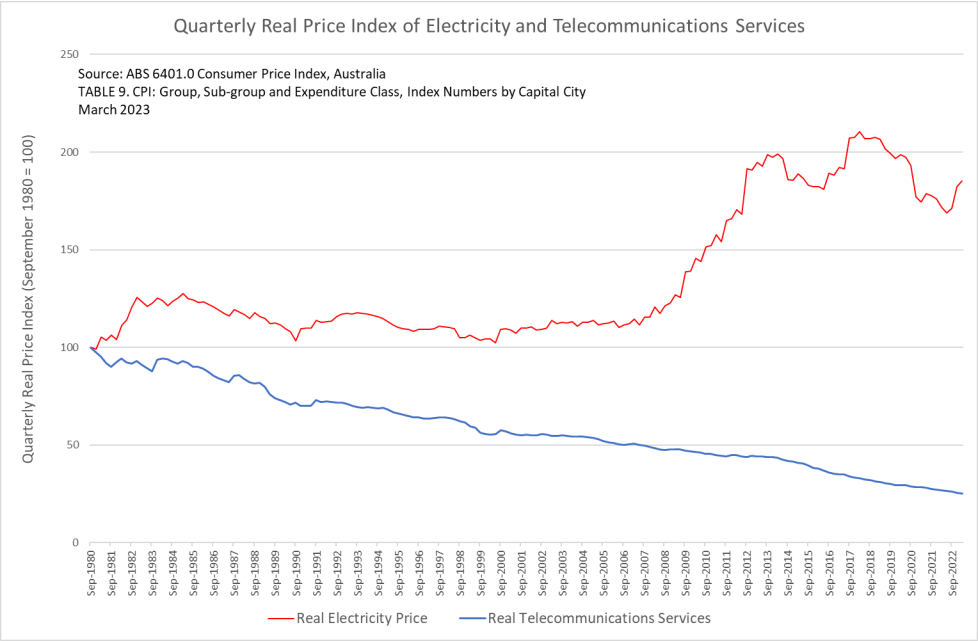
A more detailed look at the ACMA survey shows that telco (and water) were far less an issue in terms of difficulty paying bills than energy or banking (presumably credit card or mortgage repayments).

[35] https://www.acma.gov.au/articles/2023-04/acma-calls-telcos-improve-support-customers-hardship#:~:text=Protecting%20telco%20customers%20experiencing%20financial,ACMA's%202022%E2%80%9323%20compliance%20priorities.&text=For%20more%20information%2C%20please%20contact,%40acma.gov.au.



One definition of economics is the problem of unlimited wants in a world of scarce resources; a more prosaic statement is that most households must carefully manage their expenditure against a limited income stream. Importantly, if consumers struggle to pay for essential services, including food, health care, accommodation, energy and telecommunications services, that is primarily an **income** question.

The second observation is the relative difference between energy and telco in the data. Firstly, this should be put in the context of the real price of these services. The chart below shows a real quarterly price index for telecommunications services compared to electricity services since September 1980 (when they both appeared for the first time in the CPI data). One has to ask what more can be expected of the telecommunications industry in terms of affordability of services than this substantial continual reduction in real prices.



Secondly, 87% of respondents expressed difficulty paying electricity bills in the last twelve months, indicating that this is a measure of budgeting pressure and not financial hardship.

Finally, in the literature on energy poverty, the justification for distinguishing between energy poverty and poverty is that many measures to reduce energy costs require access to capital (energy efficient appliances or housing, solar panels) or are actions that renters can't take.

Finally, the consequences of disconnection between energy and telecommunications services are vastly different. Energy disconnection still requires a physical visit (for supposed safety reasons, smart meters are not used to remotely de-energise buildings) for disconnection and, importantly, reconnection. All telecommunications services are now disconnected and reconnected by operational systems under the control of customer service systems.[36]

Without doubt, telcos could do better at communicating their intention to disconnect, but disconnection remains the best credit management device to get the customer's attention. Failure to disconnect only compounds many debt issues; while connected, the customer can incur further debt. Ultimately, any unpaid debt (or amounts written off as *ex gratia* credits) is not paid for by telco shareholders; other customers pay for it. And it will be spread equally across all customers based on the size of their bills.

In summary, nothing in the ACMA's research justifies any increase in industry-specific consumer protections related to financial hardship. They do highlight the general "cost of living pressure" that has been growing for the last decade through inadequate increases in wages and welfare benefits. They highlight a general community lack of basic understanding of what to do when facing financial hardship. But both of these are societal, not sectoral, issues.

Compared to earlier phases of telco malfeasance, such as bill shock from unlimited credit arrangements and various premium services arrangements facilitated by telcos, the ACMA's data on financial hardship does not identify sectoral-specific issues requiring a sectoral response. Commenting on the ACMA's report, ACCAN CEO Andrew Williams said, "Put simply, customers want telcos to be transparent, honest, and more in tune with their needs." These are laudable goals, but the question has to be asked whether they are better achieved by having competitive processes work to improve customer service or by more efforts directed at making telcos all the same (i.e. industry-specific regulation of a direct, co-regulatory, or self-regulatory kind).

[36] When I was first employed in a customer accounts team at Telecom Australia, disconnection was a physical process inside the telephone exchange and restoration was not immediate, though usually it was a matter of hours after a phone call from accounts to the exchange.

5. Suggestions for Future Attention

Scams

The growth of telecommunications services has facilitated an ever-growing cesspool of malicious actors seeking to exploit hapless consumers. These have ranged from the various misuses of premium rate services in all their incarnations (the original 0055, 1900 and premium text)[37] through to the "internet dumping" scams.[38]

Today scams are being conducted using telco services but without the direct involvement of telcos. The ACCC has estimated that scams cost Australians at least $2 billion in 2021.[39]

The three "public" person-to-person communication services of telephone calls, the short message service (SMS) in mobiles, and email are all used extensively in scams. In all cases, they rely on some level of impersonation. Being point-to-point services means that someone originated the communication connected to a network that was ultimately inter-connected to the network used by the receiver. The concept of "network" here is easier for the direct telco services of telephone calls and SMS, but ultimately the over-the-top service of email ultimately depends on a connectivity layer.

Consumers should be able to trust the communication network and that communications come from the person they purport to come from. Ultimately, this is the responsibility of telecommunications providers.

The ACMA has increased its focus on scams, creating the Scam Telco Action Taskforce in 2021[40], which continues to meet (e.g. in February 2023).[41] The telco industry has participated by drafting the *Reducing Scam Calls and Scam SMS* in 2022.[42] Despite these efforts, Australians continue receiving scam calls, SMS and emails. There are two ways to respond to this issue. The first is to disrupt the business model by rapidly closing down the "attack vector". That is partially what the Code achieves by blocking the route by which these messages are sent. The second is by increasing the consequences for scammers, which requires prosecutions.

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[37] I was responsible at Telstra for the implementation of the new contractual arrangements for premium services that accompanied the migration from 0055 to 1900. Unfortunately when the premium rate service range was opened to competition the second entrant Optus would not participate in a cooperative scheme to ensure the same contractual terms were applied to their service providers and another wave of consumer disadvantage began. By the time we got to premium rate SMS all the lessons had been forgotten.

[38] Internet dumping was a feature of dial-up internet services. A consumer would follow a link which would result in the computer disconnecting the dial up connection and reconnecting through an international number where the service provider received a commission from the international telephone provider. This built on the service known as international audiotext, a product first developed by OTC Australia. A second order of this included specifying an operator override code (for Optus) as well as an international number. At the time Optus was entirely owned by Cable&Wireless and all the country numbers were in Caribbean countries where Cable&Wireless was the telco provider. As the number ranges were non-existant in these countries the suspicion was that the calls were actually short terminated inside Optus.

[39] ACCC 2022 *Targeting scams: Report of the ACCC on scams activity in 2021* at https://www.accc.gov.au/system/files/Targeting%20scams%20-%20report%20of%20the%20ACCC%20on%20scams%20activity%202021.pdf

[40] https://www.acma.gov.au/scam-technology-project

[41] https://www.acma.gov.au/publications/2023-05/report/action-telco-consumer-protections-january-march-2023

[42] https://www.commsalliance.com.au/Documents/all/codes/c661#:~:text=This%20Code%20is%20designed%20to,and%20otherwise%20disrupting%20Scam%20Calls.

To be effective, however, both require significant international cooperation. For disruption, for example, the domestic telcos depend on overseas originators following rules that make senders identifiable. For prosecution, the need for international cooperation is even greater.[43]

International cooperation is primarily created through technical and operational standards. The ITU, the IETF and the 3GPP primarily govern these. With market liberalisation, the strong position that Telecom Australia and OTC previously held in the ITU has waned. Similarly, the development of internet services has to a degree, seen the ITU's relevance wane.

The responsibility for these international relationships was notionally picked up by ACIF (now CommsAlliance), but its funding model never provided sufficient funds for the activity. CommsAlliance has not, to my knowledge, engaged in internet technical regulation. More recently, Departmental officers have moved into representing Australia.

The issue of scams using telephone and SMS seems, from the Code, to be relatively straightforward and involves ensuring that sender details (CLI, alphanumeric) included fall within the list of sender details authorised for use by the sender. It is pleasing to note that the ACMA has recently "breached" service providers for allowing sender IDs to be used without satisfactory checks.[44] However, as discussed shortly, the action also shows the weakness of action taken under industry-specific regulation over general consumer protections.

Australia's primary regulatory agencies, the ACMA, ACCC and e-Safety Commissioner, are all members of UCENet, the Unsolicited Communications Enforcement Network.[45] Below I present the map of countries involved in UCENet. However, participation of significance is not as great as this map suggests. For example, Russia's involvement is one association observer, while China's is the Internet Society of China.

Laudable as this is, it is disappointing that the activity isn't occurring through a United Nations led activity, nor is it connected to the major standards-setting bodies. Furthermore,

[43] A related but different issue is working with international bodies in cases of outright hacking (ie an attack on a system without the unwitting participation of another party).
[44] https://www.acma.gov.au/articles/2023-05/telcos-breached-allowing-sms-scams
[45] https://www.ucenet.org/

Australia's industry can and should be members, the supply side through CommsAlliance and the consumer side through ACCAN.

Telstra has also recently launched a new SCAM text line – where customers forward suspicious texts to 7226 ("SCAM").[46] This is a welcome development facilitated by the ACMA's creation of the 7226 number in the numbering plan in December 2022.[47] However, it poses three questions. The first is why it has taken so long for this step. Unfortunately, I have no visibility of when the ACMA started consideration of the matter. The second is why a similar service is unavailable for telephone scams (by ringing 7226, you report the last call received to your number as a scam call – the telco can identify that from call records and investigate the calling party and CLI details). The third is why this is a Telstra rather than an industry service, a question also taken up later.

In summary, while some worthwhile initiatives are finally occurring to combat scam, there is still significant room for improvement, such as including scam prevention within the remit of the TCP Code.

General protections versus industry-specific protections

The existence of general and industry-specific protections sometimes makes the industry perceive that there is a double jeopardy situation. All too frequently, however, it appears that the consequence is each regulator expecting the other to act.

The SMS scams mentioned in the previous subsection are an example of where both sets of regulations could apply. In door-to-door selling, for example, purporting to be a representative of someone who you are not representing is a clear case of misleading and deceptive conduct.[48] Similarly, purporting to be someone you are not in any communication involving trade or commerce would appear to be misleading and deceptive.[49] The industry code aims to ensure that the carrier connecting the service providers can check identity. In short, the chain should be carrier identifies misrepresentation, carrier prevents transmission of the messages and reports the attempted misrepresentation to either the police or the ACCC.

At a deeper philosophical level, however, there is a completely different way general consumer protections can work with industry self-regulation. This way is a two-step process that first requires the correction of general protections to apply at a far lower threshold. As a suggestion, any case where the consumer did not understand the contractual terms of the purchase can, and should be, considered misleading and deceptive conduct. The second step is that a registered code practice can authorise certain standard industry practices as safe harbours.

An example of the operation of such a regime is the standard contract for the supply of the service. The general legal requirement should be that the vendor must ensure the purchaser

[46] https://service.telstra.com.au/customer/general/surveys/Report_misuse_of_service
[47] https://www.acma.gov.au/articles/2022-12/new-phone-numbering-arrangements#:~:text=A%20new%20short%2Dcode%207226,fraudulent%20activity%20in%20specific%20circumstances.
[48] In the days when door to door selling of telco services was occurring misrepresentation of being a representative of Telstra was, by recollection, a frequent ploy of individual salespeople.
[49] Not being a lawyer, it might be that the issue is whether the scammer is involved in trade or commerce rather than simply attempted outright theft. Either way it seems to me that there is a prosecutable case rather than merely being directed to comply with a code.

understands the full contract. However, that requirement can be tempered by using a standard contract form registered as part of a code.

This proposed regime creates an environment where innovation can still occur but also provides a process whereby what started as an innovation can be migrated to a standard industry approach. The innovator, however, has an extra responsibility to ensure their customers fully understand the innovative characteristics of their offering.

The proposal also promotes a model of cooperating to compete. The technology sector is replete with these examples, usually in technical standards. While there are still individual technology platforms (e.g. Apple iOS and its App Store), the same technology depends on common standards for phone operation, internet protocols and WiFi and Bluetooth standards.

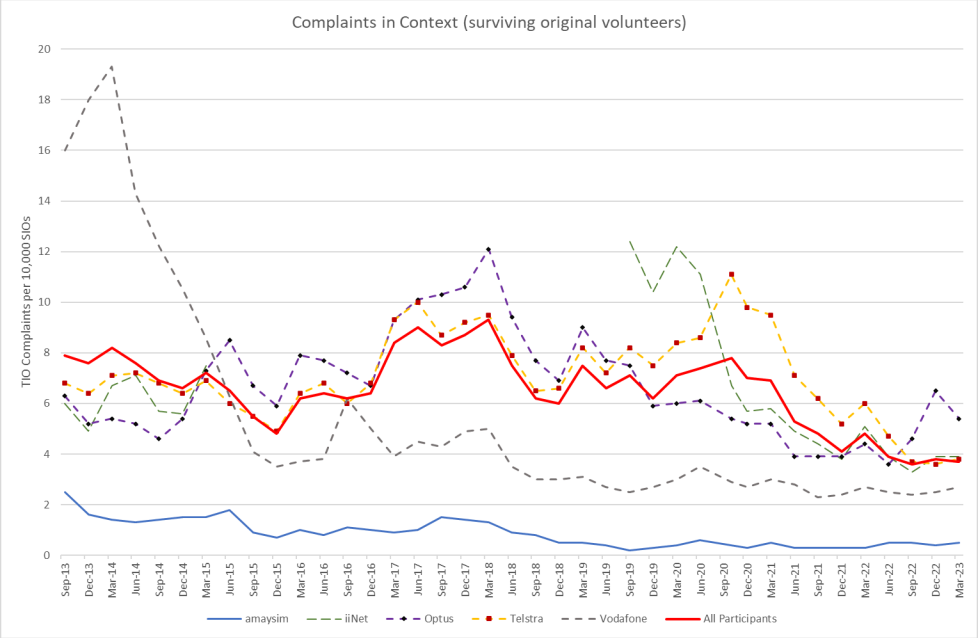
Complaints in context

The biggest information asymmetry in telecommunications markets is consumers' ability to assess the customer service standards of their providers. The difficulty of doing so is further compounded by a sense of there being no need to research because of the presumption that industry-specific protections ensure good customer service or, alternatively, that competition has raised customer service across all providers.

The industry has partially responded to this information challenge by developing its "complaints in context" reports.[50] It is possible to be mildly cynical about these reports' original motivation as merely moving the focus away from the largest providers who habitually had the most complaints.

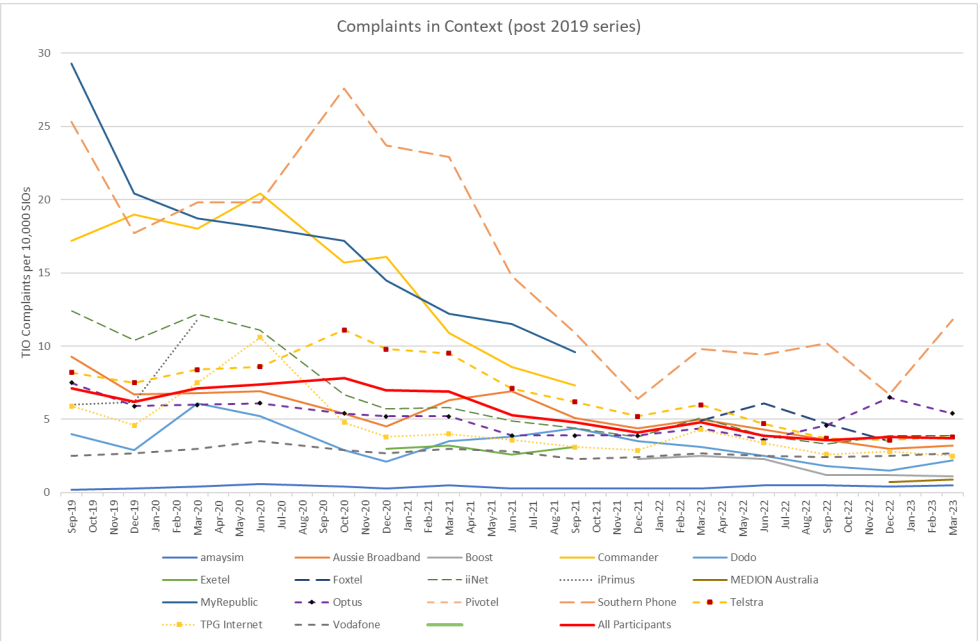
The development has been over two phases. The first phase involved those providers who volunteered to participate. This phase included iiNet, who ceased participating before later being required to rejoin in the second phase. The reported data for the original volunteers still reporting is shown below. The heavy red line is the data for all participants; it clearly demonstrates the methodology's weakness because the largest provider's performance dominates the total.

[50] https://www.commsalliance.com.au/Documents/Publications-by-Topic/CiC-Reports



The ongoing performance of amysim reflects the second weakness, that complaint types can be driven by factors other than service in operation. For example, a provider with a high volume of pre-paid mobile services will have significantly fewer billing complaints.

The second chart shows the performance since the code was changed, requiring the ten providers with the largest total number of complaints to report. The heavy red line again shows total participant scores and a healthy downward trend that the industry does not get enough credit for.



The data is otherwise interesting, reflecting high opening scores for Dodo and Commander, who have moved out of the reporting set while both are still alive as providers. The story of Southern Phone is less impressive. While it has also followed Commander and Dodo down, it has not sustained this improvement.

The data in this format does a very good job of presenting to regulators the improved performance of telcos but does little to help consumers. When the complaints in context report was first proposed, I noted to CommsAliance the differences between the drivers of complaints. For example, a provider issuing bills monthly will have more billing complaints per connected customer than a provider issuing bills quarterly. I suggested that a better approach would be one of the efficiency measurement techniques, such as Data Envelopment Analysis (DEA).[51]

DEA works by identifying the input and output measures for a group of comparable production units, $I_{1,2,\ldots n}$ and $O_{1,2,\ldots m}$. The methodology proceeds to assign a set of weights for each of the p production units that maximises the output-to-input ratio subject to the constraint that these weights make no other production unit more than 100% efficient, that is, select $\alpha_{k,i}$ and $\beta_{k,j}$ so that:

$$\max_{k\in[1,p]}\left(\frac{\sum_{i=1}^{n}\alpha_{k,i}I_i}{\sum_{j=1}^{n}\beta_{k,j}O_j}\right) \; such\ that \;\; \frac{\sum_{i=1}^{n}\alpha_{l,i}I_i}{\sum_{j=1}^{n}\beta_{l,j}O_j} \leq 1 \;\; \forall \;\; l \in [1,p] and \; l \neq k$$

This looks daunting, but it is relatively easy to perform using mathematical software (such as the open-source R). Where the "output" is a "bad", like the number of complaints, simple adjustments are made (such as solving for the inverse).

The outcome is a set of data that can give a unique score per service provider while also measuring whether the overall industry is improving. However, the data to perform those calculations does not exist in the public domain (the suggested input measures are average SIOs by service type, number of bills issued by service type and number of new connections by service type with complaint data categorised by complaint type by service by provider). For the maths to work, the number of decision-making units (p) must be greater than the sum of the inputs and outputs (n+m).

CommsAlliance should explore this methodology to expand the richness of the complaints in context data.[52]

[51] For a good overview of efficiency and productivity measures see Coelli, T, Rao, DSP, O'Donnell, CJ & Battese, GE 1998, *An introduction to efficiency and productivity analysis*, 2nd edn, Springer.

[52] I would be happy to undertake the task as a volunteer project if the data could be made available. A first order approximation can be developed from the SIO data by service type and the complaints data by service tyupe

6. Response to Consultation Questions

1. What do you understand the TCP Code's objectives to be?

The Code states its objective as to ensure "good service and fair outcomes" for all consumers. It isn't about instituting a set of consumer protections designed to raise all providers to a level of excellence. The Code also seeks to instil a "culture of compliance", which is in part reinforced by the Code's compliance framework.

More specifically, the Code seeks to deliver the seven key commitments in the introductory statement. The question should have had a second limb of "Are these objectives appropriate and sufficient?" to which my answer is no. The Code should include a commitment by suppliers to help protect consumers from scams.

2. What areas of the TCP Code do you think are working well, and why? Please provide as much detail as possible to help us understand why you hold this view.

Clearly, from the complaints in context data, suppliers are continuing to improve overall service or internal complaints management. However, as "no or delayed action by provider" is an issue in 55% of complaints to the TIO, there is room for improvement in service provider responsiveness.

3. What areas of the TCP Code do you think are working less well, and why? Please provide as much detail as possible to help us understand the problem (and, therefore, possible solutions).

Purely on the optics, the Code is working less well in being a single source of guidance for consumers on their expectations of suppliers. This is particularly true given the number of items listed in section 1.2, Relevant Documents.

The practice of CommsAlliance issuing Guidance Notes alongside Codes is valuable, especially where these add to the meaning of Code clauses. However, these Guidance notes should be consolidated when the Code is revised and consolidated into an overall guidance note.

Similarly, it would be useful for CommsAlliance and the ACMA to cooperatively address consumer awareness of the protections afforded by legislation. The removal from Codes of the pointless statement that suppliers will abide by the law was a useful development, but simply referencing the existence of the various Acts does not help consumers. A jointly authored "Guideline to consumer protections for consumers of telecommunications services" would be beneficial.

4. Are there specific issues that are adequately covered in the Code but are inadequately implemented? Or inadequately enforced? Please provide as much detail as possible to explain your position. Do you have any constructive, practical suggestions as to how these issues could be addressed?

No comment

5. Please identify any sections of the Code (or concepts within it) that you believe are no longer necessary and should be removed. This might include, for example, sections that duplicate legislation/regulation, or rules that are out of date and no longer required.

No comment

6. Are there any new consumer protection issues (not currently covered in the Code*) that you think need to be included? Please provide details. *As noted earlier, these should be matters relating to direct interactions between service providers and consumers and should not cover issues already dealt with by other regulatory, legislative or co-regulatory instruments.

In section 4.2.2, the content of the Critical Information Summary should include details on what a customer should do if they are experiencing difficulty paying their bill. This must be an explicit inclusion alongside general customer service contact information, complaints processes and accessing the TIO.

In section 5.1.2, add to (e) that consumers experiencing difficulty paying their bill should contact their service provider before the due date. This need not contain any specific reference to hardship policies; it is just consumer education about talking to suppliers.

In section 5.3.1(o), include a requirement that the contact information be specified as "for billing enquiries or to discuss with the supplier difficulties in paying the bill before the due date".

In section 7.1.1, there needs to be a definition of what "readily accessible on the supplier's website" means.

Somewhere there needs to be a specification that the call handling for Billing Enquiries, where a menu is used, should include an option to discuss difficulty paying the bill and that this option receives preference in the queue. I know providers will complain that some consumers will use this option just to gain priority, but the incidence and consequence of this "error" is less than the incidence and consequence of a consumer trying to do the right thing and discuss payment difficulty giving up on the queue and then facing avoidable consequences.

7. Are there areas of the Code that you think unnecessarily restrict service innovation or the efficient, equitable and responsive delivery of telecommunications goods and services to customers? Please explain.

No

8. Do you think that the Code's application to residential and small business customers (as defined) is appropriate? If not, why not?

No comment

9. Do you have any comments about the attestation process and other compliance activities run by CommCom?

No comment

10. Do you have any comments about other Code compliance, enforcement and reporting arrangements (other than by CommCom)?

No comment

11. Do you have any additional comments or suggestions to assist the review?

See the preceding sections. Overall the review needs to remain focussed on the role of the Code. Industry should consider actions it might take outside the Code to further enhance consumer outcomes, including:

1. Defend the principle of self-regulation or enforced self-regulation as being different to co-regulation.

2. The industry should commission a review of the "reasonable and ordinary consumer" standard applied by the courts to misleading and deceptive conduct.

3. Do not spend excessive resources on the Code review; instead, prioritise further action on scams.

7. Conclusion

Despite attempts by the regulator, the telecommunications industry's journey through industry-specific consumer protections has largely been a successful implementation of self-regulation. The industry had early stumbles with the particular topic-based codes, followed by the legalistic drafting of the first TCP Code.

Since then, however, the industry has developed an effective and responsive approach focused on code compliance and reporting and providing some metrics to guide consumers with the complaints in context reports.

Some minor changes to the Code could be made so that providers encourage consumers to contact them when they first experience difficulty paying a bill by the due date but in advance of the need to invoke financial hardship policies.