



Our ref: 51163

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Dear John,

Re: Telecommunications Consumer Protections Code Review 2018

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the review of the Telecommunications Consumer Protections (TCP) Code.

We apologise for the delay in providing this submission.

The ACCC's role in consumer protection

We make this submission as the independent statutory authority responsible for enforcing the *Competition and Consumer Act 2010* (CCA). The objective of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The Australian Consumer Law (contained in Schedule 2 to the CCA) (ACL) establishes economy-wide legal protections for consumers in their dealings with businesses. This includes ensuring that consumers are not misled when purchasing goods and services and businesses have reasonable grounds for making representations about future matters. Businesses are responsible for ensuring compliance with the ACL when they provide information to consumers.

Interaction between the Australian Consumer Law, the TCP Code and the new telecommunications industry rules

There is currently a significant amount of regulatory and policy activity aimed at improving telecommunications consumer experiences.

The ACL is a national framework for consumer transactions and contains economy-wide prohibitions, such as the prohibition against a person in trade or commerce engaging in conduct that is misleading or deceptive.

The ACCC has been concerned by increases in telecommunications complaints under the ACL and has taken action to address the underlying issues. This includes:

- investigating conduct that may breach the ACL and taking appropriate enforcement action when we find instances of misleading conduct,
- promoting clear industry guidance on how to provide meaningful and accurate information when advertising broadband speeds for fixed broadband services, and
- introducing the Measuring Broadband Australia program to provide consumers with comparable information about the performance of fixed broadband services.

The ACCC has undertaken a significant amount of enforcement work in the telecommunications sector over the past 12 months under the ACL. A number of these matters address consumer harm arising from conduct not currently addressed by the TCP Code.

The ACCC recognises that the obligations under the ACL that apply to businesses operating in the telecommunications industry are supplemented by other industry specific obligations and standards.

The Australia Communications and Media Authority (ACMA) is the communications-sector regulator and has recently made a number of rules requiring carriage service providers (CSPs) providing telecommunications services to comply with rules, which among other things, specify how complaints must be managed.

Chapter 8 of the TCP Code (Chapter 8) has set out requirements for complaints handling since the Code was first registered in 2007. However, shortcomings in these processes as well as the rules not meeting community expectations has meant that these provisions have now been removed from the TCP Code and placed within an industry standard.¹

The *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (the Complaints Handling Standard) came into effect from 1 July 2018. The ACMA also made the *Telecommunications (Consumer Complaints) Record-Keeping Rules* under which CSPs must report internal complaints data to the ACMA on a quarterly basis.

Further, the ACMA has made new rules related to NBN products and services that require service providers to:

- provide all necessary information to make informed choices about the NBN service and plan that is correct for them (*Telecommunications (NBN Consumer Information) Industry Standard 2018*),
- test that their customer's new NBN service is working after installation (*Telecommunications Service Provider (NBN Service Migration) Determination 2018*),
- provide an interim service to the consumer or, where specified, reconnect the consumer's old service if there are delays in getting the NBN service to work (*Telecommunications (NBN Continuity of Service) Industry Standard 2018*).

¹ Explanatory statement to the *Telecommunications (Consumer Complaints Handling) Industry Standard 2018*, 1-2.

These new rules are directly enforceable by the ACMA and, where breaches are found, allow the ACMA to commence court proceedings seeking remedies such as injunctions and civil penalties of up to \$10 million.

The TCP Code contains consumer safeguards and imposes obligations on CSPs in respect of their dealings with consumers. The TCP Code broadly follows the lifecycle of the customer-service provider relationship and sets out specific obligations around sales, service and contracts, billing, credit and debt management, and for changing suppliers for mobile, landline and internet customers.

The Code sets out a framework of code compliance and monitoring and is registered and enforced by the ACMA.

Issues

The ACCC is generally supportive of the proposed amendments to the Code and welcomes the industry's collaboration with consumer representatives and regulators during the Code review process.

The ACCC recently made findings on issues relevant to the Code in its Communications Sector Market Study. We have also identified some specific issues that impact consumers and which have been the subject of enforcement actions under the ACL. Our comments on the Code focus on these matters, which we consider could be addressed through stronger protections being included in the TCP Code. The ACCC urges the Communications Alliance to consider including these matters in the final revision of the Code.

1. Third party charges

Due to a high number of complaints over the past 12 months about consumers being inadvertently signed up and charged for third party content without their consent, the ACCC supports the introduction of various safeguards under the Code that will protect consumers from inadvertent or unauthorised third party charges.

As noted above, we welcome the introduction of a new provision in Chapter 5 (5.8 in the draft Code) requiring that all suppliers that include third party charges on bills must address all enquiries and resolve complaints about those charges.

The ACCC considers that the entity with the primary contractual relationship with the customer should be responsible for handling complaints related to services incurred by a customer. While clarification of this in the draft Code is welcome, this measure, by itself, does not address the underlying harm; that consumers are inadvertently incurring charges for services that they do not want.

More proactive measures would prevent these complaints from being incurred in the first place. RSPs should have adequate systems in place to ensure that consumers are aware of, and have consented to services for which they are charged.

The ACCC strongly considers that safeguards should be implemented in the Code to ensure that RSPs implement processes to prevent consumers from inadvertently incurring these charges.

In April 2018, the Federal Court ordered Telstra to pay penalties of \$10 million for making false or misleading representations to consumers in relation to its third-party billing service known as 'Premium Direct Billing', following action by the ACCC. The Court held, by consent, that Telstra had misled customers and breached the *Australian Securities and Investments Commission Act 2001* when it charged them for digital content, such as games

and ringtones, which they unknowingly purchased. Up to or in excess of 100,000 customers may have been affected.

As part of the resolution, Telstra ceased operating its Premium Direct Billing service entirely and agreed to provide refunds to affected customers.

The ACCC welcomes these industry initiatives but remains concerned about the number of consumers affected by 'scams' that use third-party billing processes to charge consumers for unwanted content.

ACCC complaints data indicates that the majority of unexpected third party charges are incurred by a customer inadvertently signing up to third party content by accidentally clicking or swiping on a pop-up advertisement button or advertisement banner. These appear on screens while customers are browsing online on their mobile phone. Some customers have also incurred third party charges by accidentally clicking on a pop-advertisement that appears while they are using an online app on their mobile phone.

In some cases, the customer only becomes aware that they have signed up for such content when unexpected third party charges appear on their mobile phone bill. Often, these charges may go unnoticed for a number of months because the charges are typically in small amounts.

The ACCC considers that the current and proposed provisions in the draft TCP Code should be strengthened.

We support the introduction of two mandatory steps before purchasing content, namely requiring activation of the Direct Carrier Billing facility by a customer and a double opt-in arrangement for each third party billed service. We consider both of these steps should require customer identity verification, to prevent the possibility of unauthorised charges.

Further, we consider that the TCP Code should require RSPs to make available at least the following information:

- who consumers should contact if they find unexpected third party charges on their account (i.e. the RSP)
- how to opt-out of the facility
- how the service works: the process required for customers to purchase content, how customers are charged through their telecommunications bills, and what type of services are offered.

The ACCC considers that these basic safeguards should be included in the Code to protect consumers from unauthorised third party charges.

2. Unauthorised customer transfers

Following concerns about consumers' services being transferred to other providers over the phone without their consent, the ACCC has expressed support for the introduction of new obligations under the TCP Code that would require gaining suppliers to record the entirety of voice calls over which the transfer is made, including the transfer request and the customer's authorisation.

Chapter 7 of the TCP Code sets out supplier obligations and the process for transferring consumer services to an alternative supplier. The TCP Code currently provides (under 7.1) that a gaining supplier must obtain the consumer's consent before they can transfer the consumer's service.

The TCP Code is also supplemented by the Customer Authorisation Industry Guidelines (CAIG). The CAIG provides further guidelines on the information to be obtained from a consumer for a valid 'customer authorisation'. Currently only the CAIG makes provision for the use of call recordings as a method of verifying consumer consent. The CAIG capture principles (at 4.1) provide that a customer authorisation capture may include the use of voice authorisations recorded on audio media. However, the CAIG capture principles are not mandatory.

The ACCC recommends the introduction of a provision under the TCP Code requiring that all sales calls be recorded in full. We consider that such a provision would strengthen consumer safeguards against unauthorised transfers by facilitating easier verification and enforcement of informed consent.

The ACCC has previously identified unauthorised transfers as a recurring problem in the industry and have taken enforcement action against telecommunications providers for unauthorised transfers. For example, in June 2017, Sprint Telco Pty Ltd (Sprint Telco) paid a penalty of \$10,800 following the issue of an infringement notice by the ACCC. The ACCC issued the infringement notice because it had reasonable grounds to believe that Sprint Telco made a false or misleading representation to a consumer during a telemarketing call in October 2016, in which the consumer was transferred from Telstra to Sprint Telco. It is alleged that Sprint Telco represented to the consumer that Sprint Telco was acting as Telstra's agent or with Telstra's approval, when that was not the case.

Following the Sprint matter, the ACCC (in consultation with the ACMA) released consumer information on unauthorised transfer of telecommunications services. This information is available on the [ACCC website](#).² The ACCC also called on telecommunications wholesalers and resellers to look at ways to prevent unauthorised transfers from occurring in the first place, such as recording entire sales conversations and improving business systems to identify unauthorised transfers at each level of the supply chain.³

Further, in December 2016, the Federal Court found that SoleNet and Sure Telecom had engaged in unconscionable conduct in connection with the supply of telecommunications services. This included customers being transferred from one SoleNet/Sure Telecom company to another without their knowledge or informed consent, and being subject to unjustified demands for payment of early termination or cancellation fees. The Court also found that in the cases of four of the six customers who gave evidence in the proceeding, the SoleNet/Sure Telecom Companies engaged in undue harassment in connection with the supply of services and payment for services. Further in March 2017, the Court ordered that SoleNet, Sure Telecom and sole Director Mr James Harrison pay penalties totalling \$250,000 and be restrained from carrying on a business or supplying services in connection with telecommunications for a period of two years.

3. Consumer lock-in

In our recent Communications Sector Market Study, the ACCC found that contracts may limit consumers' ability to easily switch service providers in the short-term as they typically lock-in consumers for 12 or 24 months, and attract a fee for early exit. This may be inhibiting competition in the migration to the NBN, in particular, as service providers can sign consumers up to contracts on legacy broadband services and then transfer them to the NBN when their area is connected (such as by marketing 'NBN-ready' plans).

² ACCC, Media Release, Sprint Telco pays penalty for unauthorised transfer, 13 June 2017 - <https://www.accc.gov.au/media-release/sprint-telco-pays-penalty-for-unauthorised-transfer>, and ACCC, Unauthorised transfer of phone & internet services <https://www.accc.gov.au/consumers/internet-phone/unauthorised-transfer-of-phone-internet-services>

³ ACCC, Media Release, Sprint Telco pays penalty for unauthorised transfer, 13 June 2017 - <https://www.accc.gov.au/media-release/sprint-telco-pays-penalty-for-unauthorised-transfer>.

This means some consumers may not be able to take advantage of the price competition currently occurring in the NBN broadband services market, and new service provider entrants on the NBN may have less opportunity to attract customers. We note that in general most service providers now offer both shorter term contracts (such as month-to-month) and no lock-in contract options to consumers, so in the long-term, lock-in may be less of a barrier to switching.⁴ However, this may continue to cause concern where, for example, no lock-in contract options have a higher monthly cost or offer fewer inclusions. This could mean many consumers may opt for a long-term contract on the basis of price and/or inclusions.

The ACCC acknowledges that long-term contracts do offer consumers benefits in the form of, for example, a supply of equipment at a subsidised rate. However, if consumers are unaware of these terms and conditions, or lack a thorough understanding of the contract they are entering into, they may be unable to take advantage of competitive benefits available in the market.

Early termination fees

The ACCC recommends that the TCP Code be amended to reflect the requirement that termination fees should not be more than the reasonable cost to the service provider of terminating that service. The ACCC continues to closely monitor consumer complaints about unfair terms in communications contracts.

Early termination fees for contracts may act as a deterrent for consumers who wish to switch service providers as fees may be difficult for consumers to estimate, or consumers may be unaware that a fee exists until they want or need to exit the contract.

Early termination fees usually involve the consumer having to pay out the entire contractual period on a pro rata basis. As ACCAN has noted, formulas for calculating these fees may not be well publicised and even when available may not effectively convey early exit charges to consumers.⁵

High early termination fees for mobile phone services can also be a strong deterrent for consumers seeking to end their contract early to switch to a new or better service.

Under the ACL, early termination fees may be unfair if the consumer contract is not sufficiently balanced and/or the fee permits, or has the effect of permitting, the consumer to be penalised.⁶ While the TCP code includes some rules about early termination fees, they relate to the disclosure of termination fees in communications offers and advertising, rather than the level of the fee.

Service providers may have different conditions, which can make it confusing for consumers when comparing offerings. Early termination fees can be represented as being the balance owing for a device, or as fees that act to lock a customer in, such as a payment for service for each month remaining on the contract.

Ensuring early termination fees are adequately disclosed to consumers during the advertising and contracting process is important to ensure consumers are aware of, and understand the conditions of the contract, and how this might restrict future ability to switch providers.

⁴ We note with regard to mobiles that Telstra has recently stopped providing month-to-month SIM-only plans for personal use.

⁵ ACCAN, [Competition in evolving communications markets—submission by ACCAN to the ACCC](#), October 2016, pp. 9–10, referred in the ACCC Communications Sector Market Study, page 128.

⁶ *Competition and Consumer Act 2010*, schedule 2, section 25.

End-of-contract notifications

In addition to this, consumers may not be able to easily identify when their contract ends which could further act to lock the consumer in to their current service provider. Service providers generally do not include the contract end date on the bill, and may not notify the customer when their contract is nearing the end date. Consumers may be able to check the end date by logging into an online account associated with their service, or may have to contact customer service to clarify when their contract ends.

The ACCC notes that the United Kingdom communications regulator, Ofcom, is currently consulting on rules that would require landline, broadband, TV and mobile services to be told when they approach the end of their minimum contract period.⁷ The ACCC recommends that a similar provision be adopted in the TCP Code.

4. *Critical information summaries*

The ACCC supports the retention of CIS provisions in the TCP Code and considers that the Code review is a timely opportunity to ensure that current CIS requirements are up-to-date. We would welcome continued discussions on the best CIS format, including further discussion on sample CIS formats and the information that could be included in a 'summary box' of critical information at the top of the CIS so that consumers can easily compare between product/service offers. We also suggest that any changes to CIS' are consumer tested to ensure they are practical, easily understood and fit-for-purpose.

5. *Definition of small business*

The definition of 'consumer' includes businesses that do "not have a genuine and reasonable opportunity to negotiate the terms of the customer Contract and has or will have an annual spend with the supplier which is... no greater than \$20,000."⁸

The ACCC notes that small businesses have rights under the ACL to be protected from misleading and deceptive conduct and anti-competitive behaviour. Under the ACL, consumer guarantees apply to all goods and services purchased by consumers. Currently, a 'consumer' can either be a business or a person, provided the goods or service cost up to \$40,000. However, the cost threshold set out in the ACL definition of consumer may increase from time to time to account for inflation and the costs of goods and services.. The ACCC considers that the ACL threshold is also likely to be appropriate for the TCP Code and more appropriately reflects the current communications needs of small businesses. We suggest the TCP Code threshold reflect the ACL threshold as it exists from time to time.

6. *Financial Hardship*

The TCP Code contains key protections regarding the provision and management of credit in connection with the supply of telecommunications products and services, including a Financial Hardship policy.

Recent reports show that the rate of default of telecommunications bills is higher than any other bills in Australia.⁹ We support ACCAN's submission to this Review on financial hardship.¹⁰ We also consider that the Code should include a requirement for RSPs to offer easily accessible financial hardship policies. Such policies should include different options for consumers to respond to financial hardship situations. Further, such policies should recognise the range of circumstances that may lead to financial hardship.

⁷ Ofcom, Consultation on end-of-contract and out-of-contract notifications, <https://www.ofcom.org.uk/consultations-and-statements/category-2/end-of-contract-notifications>, accessed on 6 August 2018.

⁸ See Clause 2.1 of the TCP Code C628:2015 (Incorporating Variation No.1/2018).

⁹ Barrymore, K 2018, 'Growth in telco bill defaults' The Daily Telegraph, June 12

¹⁰ ACCAN, Submission to the TCP Code Review, 10 August 2018, <https://accan.org.au/our-work/submissions/1528-tcp-code>.

7. Selling practices and vulnerable consumers

We also support ACCAN's submission regarding improvements to selling practices, particularly for vulnerable consumers.¹¹ Consumers can find selecting a suitable telecommunications product or service from the wide range of available options very complex and confusing. In particular, vulnerable consumers may lack the capacity to understand the financial commitments involved in signing up to these products and services or to assess what product or service will best suit their needs.

Industry needs to improve its sale practices to implement a consumer focused approach to ensure that a customer's need and circumstances are adequately taken into account. This will result in consumers being sold appropriate products, higher customer satisfaction and would likely lead to a reduction in complaints over time.

Compliance

Finally, the ACCC notes that the consumer protection rules set out in the Code will only be effective if there is a strong compliance and enforcement framework to support the Code. Industry must take responsibility for complying with the Code provisions and ensuring that non-compliance is identified, and the Code provisions enforced.

The ACCC notes the proposals to enhance the effectiveness of compliance with the Code through the activities of Communications Compliance. However, given the recent increase in complaints and non-compliance across the telecommunications sector, we consider that enforcement of, rather than compliance with, the Code should be prioritised. Our submission provides examples of enforcement action taken against telecommunications companies under the ACL. Some of the conduct addressed under these actions is likely to include conduct that would be prohibited by the Code and should have been identified at an earlier stage.

We would be happy to discuss and provide further information if it would assist the Communications Alliance in its review of the Code. Please contact Clare O'Reilly, General Manager, on (02) 9230 3854 or clare.o'reilly@acc.gov.au to discuss further.

Yours sincerely



Delia Rickard
Deputy Chair
ACCC

¹¹ ACCAN, Submission to the TCP Code Review, 10 August 2018, pp.18-19, <https://accan.org.au/our-work/submissions/1528-tcp-code>.