



Australian
Competition &
Consumer
Commission

**ACCC submission on the draft revised
Telecommunications Consumer Protections
Industry Code (DR C628:2014)**

November 2014

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Executive Summary

The Australian Competition and Consumer Commission (ACCC) is extremely disappointed by the extent of the proposed changes to the current Telecommunications Consumer Protections Code (TCP Code). The TCP Code was introduced relatively recently in an environment of systemic non-compliance and poor behaviour in the telecommunications industry. At this time, complaints about telecommunications services were the single greatest source of consumer complaints to the ACCC.

Prior to the introduction of the TCP Code in 2012, the ACCC had observed that poor standards had flourished and that the code-based framework had failed to adequately safeguard consumers' welfare. One of the achievements of the TCP Code when it was introduced was the introduction of rules which were aimed at materially improving consumer outcomes.

While the ACCC supports the objectives of Communications Alliance in critically analysing the effectiveness of regulation in telecommunications, it submits that the revisions proposed in this review go significantly beyond the intention to maintain consumer protections, remove unnecessary prescription and allow flexibility for providers as to how they meet information requirements. Further, the proposed changes pay no regard to the significant history of poor performance in the telecommunications sector which preceded the introduction of the TCP Code. For example a large number of participants in the industry either ignored or misapprehended the norms of commercial conduct prescribed under the (then) *Trade Practices Act 1974* (TPA).¹

The introduction of the current TCP Code in September 2012 marked a significant step forward for the telecommunications industry and its customers. It was the product of extensive engagement with the ACCC, the ACMA, the TIO and consumer representatives. The new rules were designed to help consumers obtain clear and accurate information about telecommunications offers and provide clear guidance to providers to promote industry compliance.

The revised draft of the TCP Code, which is not the result of a full review of the TCP Code, seeks to remove several of these recent advances, including:

- advertising rules designed to promote informed choices and discourage poor advertising practices
- customer contract rules which limit the use of unfair terms of particular concern
- credit, debt management and debt collection rules which promote best practice

The rationale put forward for a number of the proposals is that regulation already exists, including in the form of the Australian Consumer Law (ACL, Schedule 2 of the *Competition and Consumer Act 2010*). The ACCC is responsible for promoting and enforcing compliance with the ACL.

The ACCC submits that an effective regulatory strategy which is designed to protect consumers should be structured not only to address harmful conduct after it occurs but also to proactively prevent harm to consumers. This can be achieved by setting the right incentives for compliance through frameworks like the TCP Code, in conjunction with economy wide tools, like the ACL provisions.

In the ACCC's view changes to the TCP Code which substantively reduce consumer protections should not be implemented. If minor changes are implemented, caution should be exercised to ensure that vulnerable consumers are not negatively affected.

The ACCC also notes that the TCP Code applies to National Broadband Network (NBN) retail offers and that the removal of such a significant body of consumer protection rules during the migration period may unnecessarily expose consumers to harmful conduct in the transition to a new network.

¹ Siopis J, *ACCC v Boost Tel Ltd* [2010] FCA 701, para 115.

1. Review of the TCP Code

The ACCC notes that the current review of the TCP Code is not a full review of the Code which is scheduled to occur in 2017. The TCP Code as currently drafted came into effect in September 2012, with some rules coming into force as recently as September 2014.² The current review is limited to a review of the matters agreed to in the customer information framework as set out in section 4 of this submission.

2. The ACCC's role in telecommunications consumer protection

The ACCC is a national independent statutory authority responsible for enforcing the 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 ACL came into effect on 1 January 2011 as a schedule to the CCA. It is enforced by the ACCC and each of the state and territory consumer protection agencies.

The ACCC recognises that the obligations that apply to businesses operating in the telecommunications industry under the ACL are supplemented by specific obligations and standards that are imposed under the TCP Code. The Australian Communications and Media Authority (ACMA) is responsible for enforcing the TCP Code.

The ACCC supports the industry specific framework set out in the TCP Code. The communications sector is characterised by complexity and an expanding range of products and services with new functionalities. The TCP Code sets out standards of conduct for industry participants and specific measures, with which a business is expected to comply in order to meet the TCP Code's standards. The ACCC acknowledges that compliance with the specific measures will often assist a business to also comply with the ACL provisions. However, this will depend on the facts and circumstances of each matter. The ACCC works closely with the ACMA and the TIO to share information about compliance and enforcement and identify conduct that is of concern and may cause harm to consumers.

The ACCC encourages and assists industry initiatives to apply the provisions of the ACL to industry specific issues through industry codes, such as the TCP Code.³

3. Interaction between the TCP Code and the Australian Consumer Law

The TCP Code, as it is now in force, contains significant consumer protections and imposes obligations on carriage service providers in response to identified problem areas in the telecommunications industry. Accordingly, the TCP Code sets out specific obligations around clear pricing of telecommunications offers, fair advertising practices, as well as credit and debt management.

In contrast, 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

² Implementation of the TCP Code rules was staggered, with some rules coming into effect in March 2013 (such as critical information summaries), September 2013 (such as spend management alerts for data) or September 2014 (in the case of the spend management alerts for SMS/voice for small suppliers).

³ ACCC, *Compliance and Enforcement Policy* See: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>

is misleading and deceptive (CCA, Schedule 2, clause 18). The ACCC notes that the ACL was in force for over 18 months prior to the introduction of the revised TCP Code and that prior to its commencement, equivalent provisions about misleading and deceptive conduct, and misrepresentations, were long established provisions of the TPA.

The advertising and promotion of telecommunications offers has provided many examples of misleading and deceptive conduct and attracted a great deal of enforcement activity from the ACCC.⁴

It is widely accepted that an effective industry code will address specific industry issues and consumer problems not covered by legislation, or elaborate on legislation to deliver additional benefits to consumers or clarify what needs to be done from the perspective of a particular industry to comply with legislation.⁵ The ACCC considers that the current TCP Code meets each of these objectives and is an essential component of the consumer protection framework in the telecommunications sector.

One of the reasons for the extensive revisions to the TCP Code in 2012 was to address the high level of complaints and poor standards in the telecommunications industry, notwithstanding the existence of the ACL, and previously the TPA, consumer protection provisions.

While the ACCC supports measures that will ensure or enhance the effectiveness of consumer information provisions and reduce unnecessary reporting requirements on industry, it does not support the removal of obligations on industry members that improve behaviour across the sector.

In the ACCC's view a decision to remove the industry specific protections set out in the TCP Code would result in the dilution of the significant achievements that were brought about by the revision of the TCP Code in 2012. The ACCC considers that the appropriate time to review these provisions of the Code is in 2017, as part of the full review of the Code.

Further, the ACCC submits that the two regimes are complementary and to the extent that the ACL and TCP Code may both apply to the same set of circumstances, the ACMA and ACCC have processes in place to ensure there is no duplication of effort. For example, the ACCC meets with other regulators, both at Commissioner and staff level, on an ongoing basis to discuss current work and areas of concern within the remit of each individual agency.

4. Customer information framework

In February 2014 the ACMA and Communications Alliance established a Customer Information Committee (CIC) to review the mandatory customer information provisions for the telecommunications industry. The review included legislation, subordinate regulation, industry codes and guidelines. The agreed purpose of the review was to evaluate the customer information provisions and remove duplication, overlap or unnecessary obligations.⁶

In May 2014, the CIC developed a customer information framework for the review which:

- makes relevant information available to customers when they need it/want it
- maintains consumer protections

⁴ For example, *ACCC v Telstra Corporation Ltd* [2004] FCA 987 and *ACCC v SingTel Optus Pty Ltd* [2010] FCA 1177, *ACCC v TPG Internet Pty Ltd* [2013] 304 ALR 186.

⁵ ASIC Regulatory Guide 183: *Approval of financial services sector codes of conduct*.

⁶ Communications Alliance, *Regulatory Reform of Customer Information Obligations: Customer Information Provision Policy Framework*, May 2014, pp.2-3. See:

http://www.commsalliance.com.au/_data/assets/pdf_file/0007/44539/Customer-Information-Obligations-Framework-Final.pdf

- acknowledges that vulnerable consumers may need additional protections (which should not necessarily be imposed for all consumers).⁷

In summary, the customer information framework is based on four principles:

- customer-centric design: information requirements are intended to inform customers, so they need to be delivered in a way which is useful
- outcomes based approach: information requirements should move from the current prescriptive model which focusses on process to one which is focussed on outcomes
- encourage competition: less prescriptive approaches to products, services and information requirements will encourage innovation in information delivery creating more choice and flexibility for consumers
- continuous improvement: the framework should be used to consider whether existing information should be removed or its format and delivery method amended. The customer information framework should be reviewed and refined over time to ensure it still meets the agreed principles and outcomes.

Matters to consider when applying the framework include whether information:

- should be mandated or optional
- must be provided at a specific point in time or whether it is flexible
- must be given to customers or made available for customers
- needs to be provided in a particular format
- is critical for sub-groups of consumers.

As noted above, a full review of the TCP Code is scheduled to occur in 2017. This review is limited in its scope by the content of the above customer information framework and it is not within the power of the CIC to make changes to or consider comments that relate to other obligations in the Code. Accordingly, the ACCC has confined its submission to the changes that are proposed as a result of the application of the customer information framework to the TCP Code and the schedule of changes to other Codes.

5. Proposed changes to the TCP Code

Since the introduction of the TCP Code the ACCC acknowledges that there has been a marked reduction in telecommunications consumer complaints, particularly in relation to pre-sale representations about products and services and customer service. In 2012 – 13, complaints to the ACCC about telecommunications products and services fell by 30% and complaints to the TIO fell to the lowest level in 5 years. The ACCC noted that the fall in complaints was due in part, to improvements by service providers as well as the introduction of the TCP Code, and in the ACCC's view, indicates that the Code is working effectively.⁸ In the ACCC's view the fall in complaints, of itself, does not justify removing significant sections of the TCP Code, especially given the Code has only been in operation for two years.

Communications Alliance has proposed significant changes to the TCP Code following a review of the customer information provisions by the CIC. The ACCC notes that Communications Alliance has not provided any evidence or undertaken any analysis of the impact of the proposed changes. Nor has it

⁷ Communications Alliance, *Regulatory Reform of Customer Information Obligations: Customer Information Provision Policy Framework*, May 2014, p.2. See: http://www.commsalliance.com.au/_data/assets/pdf_file/0007/44539/Customer-Information-Obligations-Framework-Final.pdf

⁸ ACCC Report: Telecommunications competitive safeguards for 2012 – 13. <https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202011-12.pdf>

provided reasons as to how the specific proposed deletions would reduce the regulatory burden on industry, while maintaining consumer protections.

This submission focusses on the changes that are proposed to address potentially overlapping obligations between the TCP Code and the ACL. In addition this submission refers to some instances where the proposed amendments to the TCP Code may not be advisable because of the resulting risk of consumer harm.

Accordingly, the ACCC has focussed its submission on the following chapters of the Code:

- 4: Consumer Sales, Service and Contracts
- 6: Credit and Debt Management
- 7: Changing Suppliers

The ACCC's views in relation to the consequential changes to other Codes are discussed in section 6 of this submission.

1.1. Chapter 4 – Consumer Sales, Service and Contracts

Chapter 4 of the TCP Code contains key protections for consumers when choosing and comparing telecommunications products. Among other things, the current TCP Code introduced specific measures to improve the way in which products and services are advertised and to address particular concerns with industry practices, such as the use of the term 'cap' to describe a plan for which there is no hard cap.

ACCC's views

One of the rules marked for deletion is the rule that requires a supplier to:

- communicate its offer in a way which is clear accurate and not misleading by:
 - using language which is suited to the intended audience, and
 - providing information in a comprehensible, clear and accurate manner without exaggeration or omission of key information (4.1.1, TCP Code).

Similarly, the advertising rules are also marked for deletion. The rules in this section set out clear boundaries around the use of the words free, unlimited and cap and reinforce the importance of disclosing conditions and limitations when advertising an offer. The clause also contains obligations in relation to bundled products or services, which are particularly prevalent in the telecommunications industry and have previously been a source of significant complaint to the ACCC.

By way of example, these rules require that a supplier must not:

- use headline representations about price where the overall impression of price is qualified in fine print that makes it unlikely or impossible that a consumer could reasonably achieve the headline price
- use the word unlimited unless the service is genuinely unlimited and not subject to exclusions
- advertise or promote network coverage unless the network coverage is generally available in the coverage area
- make claims in advertising in relation to broadband speed, network coverage and other performance characteristics unless they can be substantiated (4.2.1, TCP Code).

It is proposed that clauses 4.1 and 4.2 of the TCP Code, which contain specific measures regarding advertising practices, be removed on the basis that the clauses duplicate the general prohibition set out in section 18 of the ACL against misleading and deceptive conduct.

Similarly clause 4.3 is marked for deletion and contains rules about selling practices, which include:

- accurate descriptions of products
- disciplinary action for poor conduct by sales representatives
- provisions for obtaining consumer consent, and
- promoting transfers between providers in a fair and accurate manner.

It is proposed that the rules in clause 4.3 of the TCP Code are a duplication of section 29 of the ACL regarding false and misleading representations.

Clause 4.5 sets out provisions to promote the use of fair terms in telecommunications contracts. The clause covers terms that frequently appear in telecommunications contracts such as the suspension of telecommunications services, unilateral variations and extension of the contract period.

It is also proposed that clause 4.5.3, which contains specific measures against unfair contracts, be removed on the basis that it duplicates the obligations set out in sections 23 and 35 of the ACL.

The ACCC is concerned that the proposed deletions in clauses 4.2, 4.3 and 4.5, in relation to unfair contracts, would result in a lack of clarity for industry and the risk of increased complaints from consumers.

In the ACCC's experience telecommunications providers, especially smaller providers, approach the ACCC for specific advertising guidance because they are concerned about being compliant with the ACL. All of the words identified in the advertising rules are still highly relevant in the telecommunications industry and are indicative of the types of matters, about which the ACCC receives inquiries. They are also matters which had been identified by regulators, the TIO and consumer representatives as causing considerable harm to consumers.

The measures set out in Chapter 4 of the TCP Code do not, in the ACCC's view, duplicate the ACL. The ACL sets out economy-wide prohibitions against the most harmful kinds of conduct, such as: misleading, deceptive and unconscionable conduct.

The obligations contained in the TCP Code represent good industry practice and will help a business be compliant with the ACL when advertising products or services.

More specifically, the suggested removal of clauses such as 4.2.1(m), which prohibits the making of claims in relation to broadband speed, network coverage and other performance characteristics, appears to the ACCC to be detrimental during a period in which Australian consumers will be migrating to the NBN. It is likely that market and product complexity will continue to increase as the NBN is rolled out, which will give rise to new regulatory and consumer challenges. The ACCC would be disappointed to see any diminution of industry standards during the migration process.

The proposed removal of these important clauses from the TCP Code and replacement with an Industry Guidance note, as is proposed, would be a poor outcome for consumers and is not supported by the ACCC. In the ACCC's view it is far better to have a holistic collection of telecommunications rules in the TCP Code, than to sever the advertising rules and place them in a separate and voluntary Industry Guidance note which is unlikely to create the same incentives for compliance or improvement of industry behaviour.

The ACCC submits that the proposed changes substantively affect existing consumer protections, which are to be maintained according to the scope of the current review, and should not be adopted. To highlight the impact of the TCP Code, the ACCC has set out a case study below on the use of the word cap which was a common source of confusion for consumers prior to the introduction of the advertising rules in the TCP Code.

Case study: use of the word 'cap'

The TCP Code provides that a supplier must not use the term 'cap' to advertise:

- (i) any new Offers launched after the date of the registration of the Code unless the Offers contain a Hard Cap; and
- (ii) any existing offers in any television, radio and print advertising, after six months from the registration of the Code (Rule 4.2(l)).

A supplier can still do the following at any time for the duration of the Code:

- A. use the term 'cap', or an equivalent term, to advertise existing offers that contain a Hard Cap and
- B. refer to existing, older Offers that use the word 'cap', or an equivalent term, in billing, contracts, reference materials and one on one communications with Customers.

A Hard Cap is defined as: a maximum amount applied to a Customer's use of Telecommunications Services, which cannot be exceeded.

Up until the introduction of the current TCP Code in 2012 misuse of the word 'cap' had been a major area of concern for the ACCC.

As Choice noted in 2010 the use of the word 'cap' may create an expectation that consumers could limit monthly expenditure and have certainty around their bills.⁹

In May 2011 the ACCC fined Optus nearly \$180,000 for using the term in its advertising in a way that it considered was likely to mislead consumers.

ACCC deputy chairman Peter Kell noted in relation to this matter: "If you advertise a service as a '\$49 Max Cap' when \$49 is the minimum that consumers have to pay, then you risk breaching the law by misleading consumers about the cost of the service."

The introduction of the TCP Code cap provisions saw a significant drop in complaints in relation to the use of the word cap and in the ACCC's view, indicates that the Code is working. The ACCC considers that the provisions have been of significant to benefit to consumers.

1.2. Chapter 6 – Credit and Debt Management

Chapter 6 of the TCP Code contains key protections regarding the provision and management of credit in connection with the supply of telecommunications products and services. Among other things, the Chapter deals with the application of a Financial Hardship policy. The protections afforded in this Chapter are particularly relevant to vulnerable consumers.

ACCC's views

This chapter was specifically revised in 2012 with regard to the poor industry practices that were observed at the time with regard to disadvantaged and vulnerable customers.

⁹ <http://www.choice.com.au/reviews-and-tests/electronics/phones-and-mobile-devices/mobile-phones/capped-mobile-phones-plans.aspx>

The ACCC has taken a number of enforcement actions relating to this area of industry practice. In April 2013 the Federal Court found that Excite Mobile had acted unconscionably and used undue coercion when attempting to obtain payment for mobile phone services.¹⁰ While this example is at the extreme end of the spectrum of industry practices, it highlights the significant scope for consumer harm if industry best practice is not adhered to.

A number of the rules relating to debt collection are marked for deletion. By way of example, clause 6.10 provides that suppliers must adopt best practice when collecting amounts due as set out in the joint ACCC and ASIC guideline, *Debt collection guideline for collectors and creditors*. The guideline sets out good practice and in places goes beyond just stating the law. For example it provides an indication of what the ACCC and ASIC consider to be reasonable hours of contact. The incorporation of the guideline into the TCP Code serves two purposes: first, the responsibility of adopting best practice becomes an enforceable obligation and two, suppliers are informed about the existence of the guideline.

The same rationale applies to the proposed deletion of the obligation that suppliers adopt best practice as set out in the ACCC Compliance Guide, *Don't take advantage of disadvantage: a compliance guide for businesses dealing with disadvantaged or vulnerable consumers when collecting amounts due*. Deleting the relevant clauses will have the effect of removing these obligations and will leave consumers more exposed to poor industry practices. From a practical perspective, an opportunity to educate suppliers about the existence of the guidelines will be lost, and the body of rules and guidelines made more piecemeal. In the ACCC's view the proposed deletion goes beyond the stated aim of removing duplication and would in fact, remove important consumer protections.

The ACCC notes that the guidelines have been updated and submits that the references should be updated to refer to the current guidelines.¹¹

Among some of the minor deletions proposed, are the changes relating to prescribed modes of communication with customers. While the ACCC understands the objectives of Communications Alliance in principle in proposing these changes, some instances would appear to carry more serious consequences. For example, one of the proposals is that the requirement that financial hardship arrangements should be communicated 'in writing' upon request be removed (6.13, TCP Code).

There would appear to be a very sound basis for enabling a customer to obtain a written copy of their financial hardship arrangements, if they choose to ask for one. In the ACCC's experience consumers are often requested to furnish documents and evidence to prove, for example, that a financial hardship arrangement was entered into. From the ACCC's perspective, it is better for all parties if arrangements of this nature are evidenced in writing. In addition it is not clear how the proposed change achieves the aim of reducing regulatory burden. This example illustrates the need for exercising caution when applying a blanket rule, like removing prescribed modes of communication, from the TCP Code.

The ACCC considers that the regulatory rules about credit and debt management contained in the TCP Code should be maintained given the potential for considerable consumer harm in this area.

¹⁰ <http://www.accc.gov.au/media-release/court-finds-excite-mobile-acted-unconscionably>

¹¹ See: <http://www.accc.gov.au/media-release/accc-and-asic-revise-guidelines-for-businesses-and-consumers-about-debt-collection-activities>
<https://www.accc.gov.au/system/files/Business%20snapshot%20Don%27t%20take%20advantage%20.pdf>

1.3. Chapter 7 – Changing Suppliers

Chapter 7 of the TCP Code contains consumer rights and supplier obligations when changing suppliers or transferring a consumer's services following the sale or reorganisation of a service provider's business.

ACCC's views

Issues around customer consent and the transfer of customers between suppliers continue to be a significant source of complaint to the ACCC. The ACCC considers that having regulatory rules about obtaining consent and what constitutes consent is important for both industry and consumers. Removal of these provisions would appear to go beyond the stated aim of maintaining consumer protections.

By way of example, one of the proposals is that the rules which set out what constitutes consent when a transfer between suppliers is effected should be deleted. It is proposed that the rule is already covered by the ACL and other legislation regarding unconscionable and contract law.

While it is beyond the scope of this review, experience to date suggests that the existing rules and protocols around transferring consumer services, especially in the context of company failure, are probably inadequate or ineffective and in need of a broader revision rather than removal.

1.4. Chapter 8 – Complaints handling

Among the changes proposed to this Chapter is the removal of the requirement that a supplier must formally monitor and report on compliance with their complaint handling process:

- (i) at least annually to the Chief Executive Officer (or equivalent) regarding their compliance with their Complaint handling process and opportunities for improvement; and
- (ii) on a quarterly basis to the Supplier's senior management regarding the matters set out in this chapter (Rule 8.1.1(d))

In the ACCC's view the rules requiring formal monitoring and reporting of complaints handling processes should be retained. This is a core requirement for effective complaint handling schemes and provides an important opportunity for suppliers to reflect on opportunities for improvement.

6. Consequential changes to other Codes

In addition to amendments to the TCP Code, Communications Alliance proposes amendments to a package of related industry codes. While complementary to the TCP Code, these codes deal with processes identified as requiring specific interaction between consumers and carriage service providers (CSPs) and therefore embody a number of guarantees for the protection of consumers' rights.

While supportive of the removal of unnecessary regulation, the ACCC notes that several of the amendments proposed exceed the elimination of duplicated or out-dated provisions. The ACCC considers that if implemented, these amendments would hinder existing consumer protection by removing or diluting CSPs' obligations in relation to consumers.

In particular, the ACCC notes that a number of proposed amendments remove CSPs' responsibilities established in Operation Codes with the intention that those provisions be encompassed in an industry guideline.

The ACCC notes that while all CSPs in Australia are required to comply with the codes, and the ACMA retains the power to enforce compliance, the inclusion of these provisions in a guideline provides CSPs with discretion to comply according to the options that best suit their circumstances.

Additionally, a number of proposed amendments involve altering the existing wording of clauses across the package of codes, softening the prescription of CSPs' duties or narrowing the circumstances under which these obligations would be applicable.

The ACCC is of the view that any amendment that removes or dilutes CSPs obligations in relation to consumers has the effect of lessening pre-existing consumer rights and should not be implemented.

7. Conclusion

The ACCC notes that the TCP Code came into effect in September 2012, with some rules coming into force from September 2013, and in some cases 24 months later, in September 2014.

A review of Chapter 9 (Code Compliance and monitoring) is scheduled to occur in March 2015 and a full review of the TCP Code is scheduled to occur in 2017.

The ACCC submits that a full compliance assessment should be allowed to take place as part of the scheduled full review of the Code in 2017. By this time the Code would have been in full operation for over two years and all stakeholders will have the benefit of accumulated compliance and complaints data, so that we can engage in an informed and principled assessment of the performance of the Code and whether its objectives have been met.

The ACCC acknowledges the critical importance of assessing the ongoing efficiency of regulation. In the ACCC's view however some of the measures proposed diverge from the stated aim of maintaining consumer protections.

The ACCC looks forward to the 2017 scheduled review to discuss whether the Code needs to be rebalanced, to account for the burden on the regulated community as against the inherent public value in having rules which promote a fair and competitive telecommunications industry.