Telecommunications Consumer Protections Code review

ACCC response to 20 May 2024 draft

June 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission
Land of the Ngunnawal people
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

ACCC 06/24
www.accc.gov.au

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Introduction

The ACCC is the economy-wide competition regulator responsible for enforcing the *Competition and Consumer Act 2010* (Cth). We protect Australian consumers by fostering competitive, efficient, fair, and informed Australian markets, including telecommunications markets.

The ACCC is responsible for monitoring and enforcing compliance with the Australian Consumer Law (ACL). The ACL establishes economy-wide legal protections for consumers in their dealings with businesses. It requires that businesses ensure that consumers are not misled when purchasing goods and services, and that businesses have reasonable grounds for making representations about future matters.

ACCC views on the draft Code

The Drafting Committee has made a number of positive changes to the Code throughout this process, and the draft Code improves upon its first proposal. However, the test is not whether this draft is an improvement on the existing TCP Code; rather, the test is whether this Code will provide adequate protections for consumers.

On this test, the draft Code continues to suffer from fundamental shortcomings that weaken its ability to protect consumers.

Several of these are fundamental, and weaken the entire Code. The failure to recognise telecommunications as an essential service undermines interpretation and enforcement of all provisions. Continued support for commission-based selling produces misaligned incentives, encouraging staff to engage in harmful conduct and take advantage of consumers at all stages of the sales process. The defective monitoring and compliance system limits the accountability of CSPs for non-compliance and partial compliance with the Code. And the Code's general tendency to fall back on process-based requirements rather than guaranteeing consumer outcomes (such as a duty not to enter into unsuitable contracts or to deliver fair and reasonable outcomes for consumers) similarly reduces accountability by handicapping enforcement actions.

Other specific issues include a lack of movement on easy cancellation rights, continued concerns on how mobile coverage is addressed by the Code, and unnecessarily strict conditions on remedies for consumers in vulnerable circumstances.

In addition to the above, under the current voluntary code framework:

- the ACMA does not have the power to directly alter the Code to ensure it remains fit for purpose,
- the ACMA's powers in enforcing the code are constrained by a cumbersome two-step process, and
- the financial penalties available to the ACMA after this process are very small.

In light of these fundamental concerns, we submit that the ACMA should reject the draft Code and proceed to other regulatory options.

ACCC feedback on proposed TCP Code drafting

In this section, we set out the ACCC's views on elements of the proposed TCP Code draft as circulated by Communications Alliance on 20 May 2024.

Although the draft provided on 20 May is a 'substantively' drafted Code, there is significant detail missing. As previously noted, we consider that to be able to provide detailed comments and a concluded view on the protections in the Code, it is necessary to review a full draft of the Code, along with all other relevant provisions, appendices and accompaniments.

Telecommunications as an essential service (Overview)

As we have previously highlighted, telecommunications are an essential service and it is important that the TCP Code recognises the essential nature of telecommunications by particularising this within the Code itself.[1]

Our understanding is that Comms Alliance has not adopted this recommendation because it is 'unclear what value such a statement would add'.[2]

Recognising the essential nature of telecommunications would have important material value. It would play an important part in the interpretation of the Code's provisions by regulators and courts. This would be especially relevant for the consumer protections in Chapter 9, regarding Credit and debt management and disconnection, but would affect all parts of the Code.

Including recognition of the essential nature of telecommunications reinforces how critical it is that CSPs provide consistent and ongoing access for consumers, particularly vulnerable consumers. It would also align the TCP Code with the *Telecommunications (Financial Hardship) Industry Standard 2024*.

Additionally, it would send a strong message to industry and inform their own behaviour with regards to consumers. This would be impactful in creating the cultural shift clearly required, given the continuing scale of consumer issues. CSP staff should be aware of the essential nature of the service that they are providing at all points in the provision of services, and this awareness should be reflected in the culture of the CSPs, the policies they develop and in the Code governing them.

Commission-based selling and sales incentives (Ch 6)

The ACCC remains deeply concerned by the support for commission-based selling within the Code, and does not accept the Drafting Committee's assertion that it is unrealistic to prohibit commission-based selling.

As we have previously stated, framing the issue of mis-selling as one that can be addressed by information and disclosure fails to acknowledge key contributors to mis-selling, which

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1 ACCC, *ACCC response to 17 November 2023 Drafting Committee package*, January 2024, p 1.

2 Comms Alliance, *2024 Comment Log*, [no date], p 1.

include aggressive selling practices, sales incentives and commission-based remuneration schemes.

As noted in our submission of June 2023, research commissioned by the ACCC has found that reliance on commission-based remuneration schemes drives aggressive sales behaviour and encourages agents to adopt tactics that are not fully compliant in order to secure more sales.[3] Similarly, the Consumer Action Law Centre found that that commission-based sales incentivise staff to make a sale at 'any cost,' with no sense of obligation or responsibility to the consumer.[4] ACCAN also found that telecommunications sales staff feel more pressure to meet sales targets than deliver quality customer service, and that the tension between achieving sales targets and serving the customer's interests can lead to adverse outcomes.[5] Given this compelling evidence from multiple different sources, we continue to firmly consider that commission-based selling should be prohibited by the Code.

This fundamental concern has not been alleviated by the inclusion of clause 6.1.3, which reads:

> *Where a CSP has sales incentive structures in place, the incentive structure must promote responsible selling practices by ensuring that volume of sales is not the only incentive criteria measured.*

Beyond the continued support for commission-based sales implied by this, the provision is deficient in several ways.

Firstly, its wording is vague and unclear. Comments by the Drafting Committee in its change log imply that the provision was intended to create two separate obligations for CSPs with sales incentive structures in place: to promote responsible selling practices, and to ensure that volume of sales is not the only incentive criteria measured. [6] However, the current drafting creates the possibility of a 'safe harbour' interpretation of the second obligation; that is, that if the CSP has ensured that volume of sales is not the only incentive criteria measured, then it will effectively be deemed to have promoted responsible selling practices. Clearer drafting would eliminate this concerning interpretation by emphasising that the promotion of responsible selling practices is a separate obligation.

Secondly, the provision is too narrow in its effect to meaningfully mitigate sales incentive structures. A CSP would be able to satisfy this provision merely by including a second incentive criteria alongside volume of sales. This obligation (on any interpretation) does not require the additional criteria to have a more-than-nominal effect on promoting responsible sales practices, or to be weighted to counterbalance the sales incentives. It appears unlikely that this change would resolve or mitigate our concerns with sales-based incentives.

Thirdly, the provision is not supported by additional outcomes assessed under Chapter 10 relating to responsible selling and incentives. There is no required monitoring of outcomes for responsible selling practices, which would be an important part of any move to reduce mis-selling.

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3 Frost & Sullivan, *Research into the Door-to-Door Sales Industry in Australia, Report for the Australian Competition and Consumer Commission*, August 2012.

4 Consumer Action Law Centre, *Knock it off!*, November 2017.

5 ACCAN, *Spotlight on Telco Commissions and Targets*, March 2019.

6 Comms Alliance, *2024 Comment Log*, [no date], p 3.

General duty not to enter into unsuitable contracts (Chapter 6)

We consider that CSPs should be required (as under the responsible banking requirements) to not enter into a contract with a consumer if that contract is not suitable for the consumer. While there have been some improvements in the clauses governing selling practices overall, there is still no expectation for CSPs to not enter into contracts that are unsuitable for the consumer.

As an example, cl 6.1.1 of the draft Code states that:

> *A CSP must develop and implement policies and supporting materials to promote and manage the responsible sale of telecommunications goods and services in compliance with this Code.*

This obligation is appropriate, but it is indirect and difficult to enforce. A requirement to 'develop and implement policies… to promote and manage the responsible sale of telecommunications goods and services…' is not an obligation to engage in responsible sales practices. It is still further from an obligation not to enter into a contract with a consumer if that contract is not suitable for the consumer.

Similarly, cl 6.1.2 requires that:

> *A CSP must ensure its selling processes:*
>
> *(a) promote and sell its telecommunications goods and services in a fair and accurate manner;*
>
> *(b) promote and sell its telecommunications goods and services in plain language;*
>
> *(c) clearly explain the essential information of the telecommunications good or service the consumer is purchasing; and*
>
> *(d) require that relevant staff are trained and resourced to promote and sell telecommunications good or service in compliance with this Code.*

These requirements are useful, but relate only to information-provision, and again fall short of a positive obligation not to enter into an unsuitable contract. As with those of 6.1.1, we consider that these would be best as supplements to a positive duty not to enter into an unsuitable contract with a consumer.

Duty to deliver fair and reasonable outcomes for consumers (Chapter 4)

As a general comment, we expect that all CSP staff interacting with consumers will be trained to provide information that is clear, accurate, and accessible to consumers, and that CSP staff do not omit important information required to make purchasing decisions. Further, we expect that CSPs will assist consumers, upon request, to access translated documentation or translation services, to ensure consumers reach appropriate outcomes.

The TCP Code should include a positive duty upon CSPs to deliver fair and reasonable outcomes for consumers, which are suited to each consumer's individual circumstances. Clause 4.2.2, which is largely unchanged from the previous Code, makes some effort to produce this. It requires that:

Where a consumer has disclosed a particular need or circumstance to a CSP, the CSP must:

(a) advise the consumer of any offers it has that may suit those needs or circumstances. This must include providing information about lower-cost options offered by the CSP, where appropriate;

(b) assist consumers to access further information about its telecommunications goods and services which may suit specific disclosed needs or circumstances.

There are two issues with this approach. Firstly, the onus is on the consumer to disclose the need, rather than on the CSP to make a positive effort to ascertain the consumer's needs.

Secondly, the duty listed is not to *deliver fair and reasonable outcomes* which suit the consumer's individual circumstances. Instead, CSPs are merely obligated to advise of any offers which suit the consumer's circumstances.

CSPs could comply with this duty while failing to deliver fair and reasonable outcomes in a number of ways. If CSPs have no offers that suit the consumer's needs then they are not obligated to say so, or to do anything under this provision. CSPs could provide information about appropriate offers while also providing information about (or even foregrounding) unsuitable offers. And the duty is only to provide information about suitable offers, not to ensure any kind of positive outcome for the consumer.

As such, the ACCC considers that an additional provision should be included stating that CSPs are positively obligated to deliver fair and reasonable outcomes for consumers, suited to their individual circumstances. This provision would act as an overall obligation, supplemented by the additional specificity of clauses like 4.2.2.

Easy cancellation rights (Chapter 7)

The ACCC considers that further exploration of options around easy cancellation rights must be undertaken. The Drafting Committee has noted that:

'…rules outside of the TCP Code do, arguably, make the process more difficult for consumers than the 'one-click online cancellation' option suggested by the ACCC. This includes rules in the Telecommunications Service Provider (Customer Identity Authentication) Determination 2022. A simple cancellation option as described would be a breach of this Determination, as cancellation is considered a high-risk transaction under the Code.'

In this context, it appears that further discussions outside the scope of this review will need to occur. Nonetheless, the ACCC considers that an obligation on CSPs to make cancellation as easy as possible (subject to compliance with the *Telecommunications Service Provider (Customer Identity Authentication) Determination 2022*) should be included. This would prohibit deliberately obstructive processes designed to discourage the cancellation of plans. Further reform could follow discussion of the above Determination.

Disconnection notification requirements (Chapter 9)

As we have highlighted above, telecommunications is an essential service and disconnection should only be used as a matter of last resource. As such, CSPs should have to comply with similar obligations to providers in the energy sectors seeking to disconnect a consumer.

Additionally, the exceptions to the disconnection requirements for notification (found at clause 9.3.8) are effectively identical to those in the existing Code (clause 6.7.1(a)), and remain too broad.

Metrics (Chapter 10)

The ACCC notes that this the first opportunity the Review Committee has had to comment on the performance and compliance measurement framework drafting in any meaningful way, and that there may still be details the Drafting Committee is working through. However, we hold multiple concerns about the proposed metrics in the drafted Code, and consider the Code remains highly process driven, rather than focused on consumer outcomes.

Process metrics

The process metrics, which are intended to demonstrate compliance with individual code requirements, are currently vague and incomplete. For example, CSPs have to monitor the processes described in Chapter 3*, Organisational Culture and Governance*. However, the guidance about the evidence required is unclear and still to be confirmed (see the monitoring row in Table 1: *Process metrics*). This makes it difficult to discern if these measures are adequate.

Similarly, the process metrics table (Table 1) requires a range of training to be implemented as a Code requirement. However, the guidance on details to be retained does not list evidence that the course content aligns with the Code or stipulate which jobs/roles should undertake the training. This is a concerning oversight.

It is not enough for CSPs to demonstrate they have policies in place. The Code needs to be clear about the minimum standard of evidence to demonstrate CSPs' policies, training and other requirements align with requirements of the Code and are therefore compliant.

Effectiveness metrics

We also hold concerns about the effectiveness metrics– those that are intended to assess overarching effectiveness of the Code– which are:

1. Grade of service: speed to connect to agent – voice enquiries
2. Grade of service: average speed to connect to agent – digital messaging
3. Digital engagement: App store rating
4. Complaints

While we recognise that these are measures of tangible outcomes, they are the incorrect outcomes to be measuring to determine the effectiveness of the TCP Code.

The proposed effectiveness metrics are measuring how fast consumers are receiving customer service, but not the quality of that service or the CSP's overall compliance with the Code. A consumer could connect to an agent within 90 seconds, but end up being sold an unsuitable product by the end of the phone call. By the above metrics this would appear to be a high grade of service, but in reality the consumer has ended up with a poor outcome from the engagement with the CSP.

In the ACCC's view, the proposed metrics for monitoring in cl 3.2.6– which include assessing whether CSP staff are proactively identifying consumers' needs and circumstances, CSP conduct to detect irresponsible selling, complaints about CSP sales staff conduct and

complaints about inaccurate information used to make purchasing decisions– is closer to what is required for determining the effectiveness of the TCP Code.

These metrics require further development and consideration before we can provide any meaningful comment on their suitability.

Customer Service Report (Chapter 10)

The draft Code introduces a customer service report, also described as a customer service indicator report in the Definitions section. The purpose of the customer service report is to be a short, easy-to-read, individual CSP public report on a small set of customer service indicators. The customer service report must be prepared by CSPs with over 30,000 services in operation and/or over 200 customer service enquiries per quarter. The customer service report will be a combination of the effectiveness metrics discussed above and the TIO complaints for that CSP or its complaints-in-context report. The customer service report is expected to be published by CSPs on their websites.

Our concerns with the metrics above render this report less useful than it might be. As the public reporting is not directly correlated with compliance to the Code, it provides no information for consumers about a CSPs compliance status in relation to the Code's consumer protections.

Compliance processes (Chapter 10)

Repeated partial or non-compliance

In our June 2023 submission we noted that the Code allows suppliers to identify that they are only partially compliant with the Code and submit a compliance attestation to that effect, and that there is no limit on the number of occasions on which a telecommunications supplier can report being partially compliant.

We note that the draft Code now has an escalation process as soon as a CSP has not been able to rectify issues following a finding of partial or non-compliance. This should mitigate repeated partial compliance where enforced. However, it appears that a CSP could 'yo-yo' between being partially or non-compliant and compliance from year to year, without any difference to the process which must be followed (i.e. a CSP that has been found to be partially or non-compliant in previous years is treated the same under the current drafting as a CSP that has never been found as partially or non-compliant).

The draft Code could therefore benefit from the ability to refer a CSP with a history of partial or non-compliance directly to the ACMA, without going through the CAP or RCAP process.

Auditing and external assessment

The ACCC also noted in its June 2023 submission that the Code compliance provisions required only large suppliers to provide a statement of independent assessment by an external auditor about the supplier's compliance program, and that this independent assessment of the compliance program was only required once. The ACCC considered that a best practice compliance approach would encompass at least biennial independent auditing, and would require that all suppliers who are not small suppliers be subject to the same auditing requirements.

We welcome the annual assessment and auditing, and we acknowledge that Communications Compliance is external to CSPs. However, we have concerns about its independence, given that its funding is entirely dependent on the CSPs it is auditing.

The ACCC is also concerned that Communications Compliance is not adequately funded to conduct thorough compliance assessments for all the CSPs in operation, given the significant volume of assessments it must complete and the wider scope of its role under the drafted TCP Code. Moreover, Communications Compliance appears to be a relatively small organisation, and may struggle to go beyond the information it is directly given by CSPs in making its audits.

As Comms Alliance did not provide the Review Committee with a copy of the compliance questionnaire that Communications Compliance will require CSPs to complete, we are unable to assess if the type of information requested from CSPs will be effective in demonstrating compliance with Code.

We do note that Communications Compliance (together with Communications Alliance) will report annually on their websites a list of CSPs that have completed the compliance assessment. These two organisations will also publish a list of CSPs that have been referred to the ACMA for formal enforcement action. Communications Compliance and Communications Alliance will not, however, publish which CSPs are repeatedly partially compliant as part of this reporting. We would like to see this information published, to promote full transparency on which CSPs are complying with the Code.

Mobile coverage (Chapter 5)

The ACCC welcomes efforts by industry in addressing deficiencies in the provision of mobile coverage information through the proposed changes regarding mobile coverage in the draft Code. The ACCC notes new and updated requirements in cl 5.2.4 (i) – (k) require CSPs to comply with several obligations when advertising their products. These include prompting consumers to review the CSP's generally available network coverage (defined to mean the coverage information on a CSP's website) or that of the underlying wholesale network, and to ensure that coverage claims are fair and accurate.

In relation to the sales process, cl 6.1.6 requires that:

> *Prior to the sale of a mobile telecommunications service to a new residential consumer where the sale is assisted, the staff member facilitating the sale must prompt the consumer to check the critical locations the service is intended to be used.*

Additionally, cl 6.1.9 states that:

> *Where a customer has purchased a customer contract for a mobile telecommunications service, and actual mobile network coverage does not meet the customer's coverage requirements (see cl 5.3.6(k)), a CSP must allow the customer to exit their service contract with no early exit fees.*

The ACCC welcomes these proposed changes to the Code. However, the ACCC considers there are still deficiencies in these proposed provisions.

While consumers are entitled to exit their contracts without early exit fees under cl 6.1.9 if actual mobile network coverage does not meet their coverage requirements, it is not clear whether consumers would also be entitled to a refund for fees already paid in these circumstances. In many cases the consumer will have already begun paying for a product or service that they are unable to use, after relying on the mobile coverage information provided

by the supplier suggesting that they would have coverage where they need. If the mobile coverage information turns out to be inaccurate, the provisions should make clear that consumers are entitled to a refund for the fees already paid for the service.

Furthermore, these proposed provisions (while representing a positive development) do not rectify the underlying problems regarding the provision of mobile coverage information by the mobile network operators. As the ACCC has consistently highlighted in various processes in the past,[7] coverage maps are based on predicted coverage, and therefore do not necessarily reflect an on-the-ground experience and are frequently inaccurate. In addition, mobile network operators likely use different methods and input parameters in producing coverage maps (which can change over time), so public coverage maps are not directly comparable. These underlining issues inhibit the ability of consumers to make informed choices when purchasing mobile services, and can undermine the competitive process, given mobile coverage is an important focus of competition.

The ACCC notes Communications Alliance's suggestion that further consideration of coverage issues relevant to the TCP Code be explored in light of the government's findings in the National Mobile Coverage Audit. The ACCC agrees that the findings of the National Mobile Coverage Audit will be useful in assessing the accuracy of the mobile network operators' coverage maps. However, the ACCC is disappointed by industry's continuing reluctance to commit to working together to ensure more comparable coverage maps by adopting more consistent methodology and input parameters in producing coverage maps.

Additionally, the ACCC considers that cl 5.2.4 should also obligate CSPs advertising mobile telecommunications services to prominently note that coverage maps and claims refer strictly to outdoor coverage.

Remedies for consumers in vulnerable circumstances (Chapter 6)

The ACCC considers that the requirement for 'reasonable proof of vulnerability' to cancel services under cl 6.1.10 should be substantially modified to be more practical for consumers, and to remove the requirement for the vulnerability to have been at the time of the sale rather than onset subsequently.

While we understand the need to limit detriment to business, we are concerned that the proof of vulnerability which CSPs can request under the clause (other than in cases of domestic and family violence) does not reflect best practice and is not practical.

In addition to the fact that it can be traumatic for the consumer being required to provide 'proof' of their vulnerability, in many instances it will also be practically impossible. This will often be a necessary consequence of the circumstances of the vulnerability or the mis-selling. It is common that instances of mis-selling are identified after the fact. Where the nature of a vulnerability is episodic or medical it will not necessarily be possible to acquire retrospective proof. Consumers are no less vulnerable or in need of protection from mis-selling because the specific circumstances of that vulnerability or mis-selling precludes this retrospective proof.

Further, limiting the ability to cancel a contract only to circumstances where vulnerability was occurring *at the time of the sale* may lead to adverse outcomes for consumers who have begun experiencing vulnerable circumstances since the time of the sale (potentially as a result of the sale itself).

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[7] See ACCC, *Measures to address regional mobile issues*, October 2017, pp. 5–7; ACCC, *Regional Telecommunications Review 2021: ACCC Submission*, September 2021, pp. 10–12; ACCC, *ACMA's approach to expiring spectrum licences: ACCC submission*, August 2023, p. 8, available on the ACMA website.

Little movement has occurred on this significant issue since our January 2024 submission, and we are very concerned that the Drafting Committee does not consider these changes necessary. This change is necessary to ensure that consumers are able to access the benefits of this provision in a way that is practical for them, and the Drafting Committee's failure to address this is a significant issue.

Culture, policies and training (Chapter 3)

The ACCC has previously noted that it is critical that obligations on CSPs regarding their organisational culture and policies be drafted in such a way that provisions are specific, measurable and enforceable. [8] We note the drafting in Chapter 3 of the Code that places a requirement on CSPs to have internal policies and supporting materials on supporting consumers, responsible selling practices, customer service and account management, credit management, debt management and disconnection.

However, these obligations are not specific, in that they do not detail exactly what must be included in these policies (beyond vague references like 'as detailed in Chapter X'). Further, these are not enforceable, because it is not clear which specific elements of the various chapters need to be included in these policies. These obligations are measurable– insofar as one could measure whether a CSP has these policies in place– but it would be difficult to measure the effectiveness of these policies, given the lack of specificity. We provide further views on this in our discussion on Chapter 10, above.

Additionally, the ACCC has specific concerns about the training of staff on TCP Code compliance. Specifically, the TCP Code should require that training occur after any revisions to the Code and/or the introduction of or change to other regulatory protections for consumers. This would ensure that staff are continuously up to date on their obligations.

'Residential customers' (Chapter 8)

The ACCC has general concerns with the use of 'residential customer' throughout the Code, as it often restricts important protections from applying to small businesses (who likely remain in an unequal bargaining position relative to the CSPs they deal with). This is most concerning at 8.11.5, where the use of 'residential customer' implicitly allows a CSP to encourage or require a small business not to receive a refund from a direct debit error, or penalise them for requesting a refund. Given that these direct debit errors are on the part of (and to the benefit of) the CSP, limiting these protections is deeply concerning.

The ACCC acknowledges that there may be circumstances where the nature of a business versus residential customer may be relevant to the protections necessary or how they are to be applied. Credit assessments may be an example of this. However, this should certainly not be the case for the basic protections under the Code. Prompts to check the coverage available at the critical locations of use (cl 6.1.6), usage notifications (cl 8.2.3) and notifications of additional charges (cl 8.2.8) are examples of protections that are similarly important for small businesses as for residential customers. These should be applied to consumers generally and not merely to residential customers.

Failed direct debits and financial hardship (Chapter 8)

There has been no response to our recommendation that a failed direct debit should be considered an early indication of financial hardship, and that consequently a requirement to

[8] ACCC, *ACCC response to 17 November 2023 Drafting Committee package*, January 2024, p 11.

provide information about financial hardship assistance should be triggered by a failed direct-debit payment.[9] This would provide an important route of identification for at-risk consumers, and help contribute to the Code's goals of identifying and supporting vulnerable consumers.

We also note that although the drafted Code includes mention of 'financial hardship indicators', these are not defined anywhere in the Code (nor is there any reference to these being defined elsewhere, such as in the Financial Hardship Standard).

Notice of direct debits (Chapter 8)

The ACCC is comfortable with keeping the 3 working days for reminder notices of an upcoming direct debit, on the proviso that this is sufficient time for any consumer changes to their direct debit arrangements to be processed before the direct debit is made. However, the more important issue for the ACCC is the contents of that notice.

Specifically, we are concerned by the continued lack of requirement to note the amount that will be debited in the direct debit notice. We acknowledge that there may be challenges to determining the exact sum before the day on which it is due. However, an obligation to include an approximate or maximum amount that will be debited (for example, 'up to $X will be debited from your account') would have substantially the same effect, and would be valuable for consumers.

The requirement in cl 8.11.3 to notify consumers of a failed direct debit is beneficial. However, this is subject to the same concerns around the lack of quantum as for the initial notice.

Default listings and debt collection for domestic and family violence-linked failures to pay (Chapter 9)

The ACCC welcomes the addition of cl 9.6.3, which obligates CSPs to remove default listings from consumers where the CSP considers that the failure to pay was not the fault of the consumer due to domestic and family violence. However, there does not appear to be any obligation on CSPs to not refer customers for debt collection where there are domestic and family violence concerns, or where it may suspect that there are domestic and family violence concerns. This is a significant omission, as such consumers are likely to be in a vulnerable position and be at risk if debt collection is pursued against them.

Codification of domestic and family violence provisions (Chapter 4)

The ACCC supports the inclusion of provisions from the *Assisting Customers Experiencing Domestic and Family Violence Guideline* in the body of the Code. This will make those provisions binding on CSPs and facilitate their enforcement.

This codification has highlighted a potential inconsistency between cl 4.25 and cl 4.2.6. Currently cl 4.2.5 rightly prevents a CSP from requiring proof of domestic and family violence as a pre-requisite for accessing general assistance and support under the CSP's domestic and family violence policy. However, cl 4.2.6 allows a CSP to require specific information to support particular actions under their domestic and family violence policy, to support

[9] ACCC, *ACCC response to 17 November 2023 Drafting Committee package*, January 2024, p 14.

compliance with other legal or regulatory obligations, which appears to be in tension with cl 4.2.5. For the sake of clarity, cl 4.2.6 would benefit from a note that this still does not allow a CSP to ask for proof of domestic and family violence, but merely to provide other information necessary to comply with other legal and regulatory obligations.

Accessing customer service (Chapter 7)

The ACCC is concerned that cl 7.1.2 and cl 7.1.3 provide insufficient communication options for vulnerable consumers, given there is no obligation for a phone service to be available for consumers to contact CSPs. Vulnerable consumers without access to– or capacity to use– a computer or smartphone will struggle to make use of any non-phone customer contact method. Moreover, they are unlikely to be able to take advantage of 7.1.3 if it requires them to first engage with the live chat service. As such, a failure to guarantee a phone option for these customers may leave them unable to take advantage of any customer support channels available.

CSP-initiated changes to a contract (Chapter 7)

The ACCC considers that consumers should be notified before any change in the terms of their contract with a CSP. The draft Code has partially addressed this concern, with cl 7.2.2 stipulating:

> '*Where a CSP proposes a detrimental change to a customer's telecommunications service contract, it must notify the consumer at least 20 working days before the earliest date the proposed change may be completed.'*

The ACCC supports this change. However, cl 7.2.3 exempts a CSP from this requirement under several circumstances. This includes where it reasonably considers that the change is likely to have a beneficial or neutral impact on the consumer. This exemption is concerning, as it allows for significant CSP discretion in determining whether a change is likely to have a neutral or beneficial impact on consumers. Depending on interpretation, it may also allow for CSPs to 'bundle' small changes together into one that they consider has a neutral impact overall without notifying consumers.

Clause 7.2.3 (b) also exempts CSPs from their notification requirements when the changes are required by legal or regulatory obligations. This may justify shorter notice requirements in certain circumstances (i.e. where the change must be implemented sooner than 20 days after a consumer could be notified). However, it does not justify failing to notify a consumer at all about (potentially detrimental) changes to their contract.

As such, the ACCC considers that the exemptions in clause 7.2.3 should be removed. A consumer should be notified when their rights and obligations under a contract have been unilaterally varied, to give them the ability to decide whether this change is impactful for them (and to potentially terminate the contract if so). Additionally, the word 'detrimental' should be removed from clause 7.2.2 for the same reason.

Communication with non-English speakers (Chapter 4)

The Drafting Committee has taken steps within the draft Code to address concerns raised by the ACCC on communication with non-English speakers. In particular, CSPs with targeted advertising in a language other than English must provide essential information and reasonable assistance to consumers in that language. Additionally, CSPs must provide contact details for interpreter services in at least 5 community languages.

While these are positive steps, the ACCC is concerned that the valuable and important protections given in the drafted Code to consumers speaking a language that has been specifically advertised to are not available to other non-English speakers. At a minimum, CSPs should be required to provide Critical Information Summary' and information on hardship supports in common languages other than English which are spoken in Australia. This obligation to provide a minimum of essential information in a readable format should be independent of the advertising choices of the CSPs. A failure to include this in the Code increases the risk of mis-selling to some of the most vulnerable cohorts of consumers, so we do not consider this to be an unreasonable impost to require of all CSPs (as has been suggested by Comms Alliance).

Additionally, the ACCC considers that funding requirements should be put in to support existing interpreter services for use by their First Nations consumers. In the 2021 Census, 76,978 Aboriginal and Torres Strait Islander Australians reported speaking one of 150 different Indigenous languages at home. This is 9.5% of the Aboriginal and Torres Strait Islander population in Australia.[10]

There are currently 104 NAATI-certified interpreters and translators practising in 30 Aboriginal and Torres Strait Islander languages across Australia. Providing assistance and funding to these groups would be of significant benefit to First Nations consumers, and would help minimise the risk of unsuitable products and services being sold to these consumers.

Guidance (Chapter 3)

The use of guidance within the Code still requires substantial work. This is a general concern throughout the Code. The ACCC had provided feedback on previous drafts that definitions and other critical provisions should be codified rather than expressed as guidance. The Drafting Committee has clearly invested time into doing so, and the ACCC appreciates the work done in this regard.

However, a substantial percentage of guidance notes and breakout boxes within the Code still include legally significant information that should be more formally codified. This includes any guidance notes or breakout boxes that narrow or expand the obligations contained within the body of the Code, including by defining critical terms used in the Code.

The ACCC agrees in concept with the methodology the Drafting Committee has articulated on this issue in its comments log,[11] but consider that further work is required to consistently implement this methodology.

Content of the Critical Information Summary (Chapter 5)

The ACCC is pleased to see that at least two fee-free payment methods must be included in the Critical Information Summary. However, the ACCC continues to consider that Critical Information Summaries should be required to include information about the ACCC and our role, as well as the Australian Consumer Law consumer rights available to consumers. The Drafting Committee has emphasised that the Critical Information Summary must be short and contain only essential information, and the ACCC acknowledges these points.

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[10] National Accreditation Authority for Translators and Interpreters (NAATI), *Indigenous Interpreting Project*, [no date], accessed 21 June 2024.

[11] Comms Alliance, *2024 Comment Log*, [no date], p 1.

However, given the prevalence of breaches of the Australian Consumer Law in this sector, we consider that the provision of information about the rights it affords and the avenues available to consumers is essential. This information would need to be in summary form to preserve the readability of the Critical Information Summary as a whole, but this does not take detract from the necessity of its inclusion.

The ACCC would also prefer that the Critical Information Summary also contain the relevant information about any additional payment options available to consumers – including any relevant fees – in its body. However, this is a lower priority than the information about consumer's Australian Consumer Law rights and the ACCC.

We also consider that even if Comms Alliance considers the 2-page limit for the Critical Information Summary is not enough, this limit should be expanded to 3-pages rather than be removed altogether.

Essential information (Chapter 5)

The ACCC considers that essential information should be provided in an accessible format with every product sold. The changes to essential information in Chapter 5 and Chapter 6 have adequately captured this need, and the ACCC is supportive, subject to one qualifier below.

Inclusion of information about the quantum of any early termination fee should be mandatory in communications offers and advertising, including whether this quantum is affected by the return of any relevant service equipment. Clause 5.1.5 (a) goes some way to satisfying this requirement, as it requires the Critical Information Summary to contain 'information to assist a consumer in approximating any early termination fees applicable at any time during the minimum term…'

However, the information in the Critical Information Summary is not required to be included in advertising and communications offers. Essential information must be provided, but this does not capture information on termination fees. As such, this information will not be available to consumers from advertising. The inclusion of termination fees (including their quantum and whether they are affected by returning relevant service equipment) in the definition of 'essential information' would resolve this concern.

Remedies for mis-selling (Chapter 6)

The ACCC supports the changes to cl 6.1.7 to clarify that it is compulsory for a CSP to take action in response to mis-selling, and thus that the clause should state that a supplier *must* take action and *may* utilise one or more of the listed remedies. The ACCC considers that the discretion to choose between these remedies would be best afforded to the consumer– as the aggrieved party and the one with most awareness of their specific needs and circumstances– rather than the CSP. However, the ACCC nonetheless supports the extension of cl 6.1.7 to obligate a response from the CSP.

'Consumer' (Chapter 1)

The exclusion of many small businesses from the definition of consumer is concerning. The draft Code has gone backwards in this regard from the existing Code, with new exclusions for account managed customers, integrated customers and those 'assessed on reasonable grounds to not be small.'

This has multiple negative effects on the implementation of the Code. Firstly, it prevents many small and medium businesses – who often remain at a significant bargaining disadvantage relative to the CSPs they are engaging – from receiving the protection of the Code, including around issues like mis-selling and the provision of information.

Secondly, it further contributes to the fragmentation of the definition of 'consumer' between different regulatory regimes. The ACCC's proposal to align this definition with that given under the Australian Consumer Law would have increased regulatory consistency and consumer understanding, and we are concerned by this move in the opposite direction. While we acknowledge the Drafting Committee's comments that the intention is to cover small businesses, not large businesses, this inconsistency with the Australian Consumer Law is challenging.

Thirdly, it creates confusion as to how a CSP could determine that a business does not fall within the scope of the Code. There is a guidance box that assists with interpreting 'reasonably assessed not to be small', but codifying this would reduce the risk of inconsistencies between CSPs.

Finally, there does not appear to be a requirement to notify a business that the CSP has deemed them not to be a small business; a customer could therefore think they are 'small' (and protected by the TCP Code) and be unaware that the CSP does not consider this to be the case. A requirement to notify the consumer if the CSP does not consider them to be protected by the Code is essential here.

'Financial hardship' (Chapter 1)

The ACCC is pleased to see the inclusion of low income within the definition of financial hardship, and thus within the definition of consumers in vulnerable circumstances. Low income is a consistent and significant source of consumer vulnerability, and its inclusion in this definition will help these consumers access the protections in this Code.

Declined credit assessments (Chapter 6)

The ACCC is concerned that there is no specific requirement in cl 6.2.5 for the CSP to inform the consumer of lower-cost alternatives. With the note below the provision, it is clear that a CSP could comply with their obligations by informing consumers of possibilities for upfront payment or the use of a guarantor, without mentioning lower-cost options. This information is an important mechanism to ensure that consumers are aware of the most affordable options available to them. Clause 6.2.5 should go further than the current 6.2.5 (b), by specifically requiring CSPs to inform consumers about lower cost alternative telecommunications goods and services (i.e. not allow this to be optional)

Contract end dates (Chapter 8)

The ACCC notes that telecommunications service providers generally do not include the contract end date on a bill, and may not notify a 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. We consider that consumers should be actively advised of an impending contract expiry date. We further consider this should extend to a notice of benefit expiry date.

We note that since February 2020, the British Office for Communications (Ofcom) has required that telecommunication suppliers provide notice that a contract is coming to an end. Ofcom's research has indicated that these end-of-contract notifications have led to significant consumer benefits in nudging consumers to seek out better deals for the supply of their telecommunications services.

Given these benefits, the ACCC considers that a similar requirement should be implemented in the TCP Code. Ideally, this notice would also include a list of similar or cheaper plans currently available on the market to help inform consumer choice.

Payment flexibility (Chapter 8)

The ACCC supports the changes made in cl 8.10.2 to require at least two fee-free payment methods, at least one of which must be manual.

The ACCC also welcomes cl 8.10.3, which states,

> *Where a CSP offers a direct debit payment option it must, at no charge, allow the customer flexibility with their direct debit payment, by:*
>
> *(a) choose a recurring payment date; or*
>
> *(b) choose a payment frequency option (e.g., fortnightly or monthly); or*
>
> *(c) temporarily defer a payment without penalty.*

However, Communications Alliance has made clear that CSPs are only obligated to provide one of these sources of flexibility, not all three as we would prefer. As such, the provision is less useful for consumers than it initially appears.

Cancelling or updating direct debits (Chapter 8)

The ACCC holds an additional concern about cl 8.11.1 (c), which requires CSPs using direct debit to 'ensure that a customer can readily cancel or update a direct debit authorisation'.

The ACCC does note that consumers are able to cancel direct debits via contacting their financial provider, and this will often be more convenient for them than cancelling the direct debit through the CSP. Nonetheless, more specificity is needed around the term 'readily', as it is currently vague and may be interpreted differently across CSPs. This should ideally involve both an online mechanism and a phone line, both of which are easy to access and use. Otherwise, a theoretically simple mechanism could be unusable for some consumers, particularly those experiencing vulnerability.