Telecommunications Consumer Protections (TCP) Industry Code (DR C628:2014) and Operations Codes

Submission by the Australian Communications Consumer Action Network to Communications Alliance

November 2014

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About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Introduction

ACCAN would like to thank Communications Alliance for the opportunity to make public comment on its draft amendments to the Telecommunications Consumer Protections (TCP) Code and Operations Codes. We note the TCP Code is a cornerstone instrument around which appropriate consumer safeguards have developed in response to demonstrable consumer detriment. As such proposals for reform should be carefully scrutinised to prevent risk to consumers and industry.

ACCAN has taken time to consult broadly in developing a considered response to each of the proposed reforms; a great many of which we feel are appropriate and will streamline obligations and aid overall compliance. The focus of this submission will be on areas which we are concerned will diminish appropriate consumer safeguards. In one instance we propose that the reform process could go further and remove an unused area of the TCP Code.

The TCP Code has played a vital role in arresting complaint figures and improving overall levels of customer satisfaction with the telecommunications industry. This can be seen in Communications Alliance's customer satisfaction survey which has shown the percentage of dissatisfied and very dissatisfied customers fell from 19% in mid-2013 to 14% in September 2014.[1] We are pleased to see this trend but acknowledge there is still work to be done; as such there is significant risk in rolling back provisions that have demonstrably led to the decline.

Given these improvements we call on industry to justify the need for change. The TCP Code was only implemented two years ago with the final measures being rolled out in the later-half of 2014, so we don't need to look back far to see the cost of getting the balance wrong. Prior to the progress made by the Code this sector was defined by high numbers of complaints and low levels of consumer trust. Unfortunately consumers will bear the cost of any ill-advised code changes, yet without evidence based analysis of those changes the benefits of the current reforms remain uncertain.

We have used the Customer Information Provision Policy Framework to guide our feedback in this consultation as we believe its principles to be sound. When correctly adopted, this Framework has the potential to improve consumer understanding while reducing unnecessary obligations on industry.

The role of the TCP Code

As a starting point we believe it is important to reflect on the role the Code plays in ensuring appropriate consumer safeguards are met. The TCP Code cannot be considered in isolation of the context in which it was created. A major component of the proposed repeal is the removal of clauses which seek to address poor advertising and sales practices, primarily because they are seen as duplicating parts of the Australian Consumer Law (ACL).

Many of these Code obligations were created over and above the ACL to address deficits in telecommunications industry practice. The ACL existed prior to these Code provisions and despite

[1] Communications Alliance, 2014, 'Telecommunications Customer Satisfaction', available at: http://www.commsalliance.com.au/__data/assets/pdf_file/0019/40870/Customer-Satisfaction-Survey-September-2014-W7.pdf

the ACL's existence it was still a time of record high telecommunications complaints. The ACMA's 'Reconnecting the Customer Final Report' (RTC) gave a clear indication that a key driver of complaints was the lack of quality information available to consumers in the pre-sale marketing and advertising and pre-contract phases of the customer lifecycle.[2] The ACMA's number one proposal in the RTC Report was to introduce clear and enforceable rules that applied to advertising practices.[3] In particular it sought to ban terms known to be confusing for consumers, for example 'cap'. This was the foundation of Chapter 4 of the TCP Code, the same section now slated for removal.

Since the introduction of Chapter 4 complaints to the TIO have dropped 28% to the lowest point in 6 years.[4] Analysing the root causes of complaint reductions can be an imperfect science, particularly when looking at advertising and sales practices. Complaints by their nature do not manifest until something 'goes wrong', however their underlying cause usually stems from a disconnect between consumer expectation and reality. These expectations are overwhelmingly created in the pre-sale marketing and advertising and pre-contract phases of the customer lifecycle. As the RTC Report identified complaints manifest when "consumers have incorrect (but not unreasonable) expectations about key features of their products".[5] To manage the disconnect between expectation and reality there needs to be appropriate measures in place to curb confusing sales practice. Hence the need to retain the advertising provisions in Chapter 4.

Encouraging competition

This approach isn't just appropriate from a consumer safeguard perspective; it actually encourages properly functioning markets. Informed consumers make markets work. As the Communications Alliance 'Customer Information Framework' recognises the efficient operation of the market requires informed consumers who can adequately compare the quality and price of products before making purchasing decisions.[6]

As markets and technology evolve they become infinitely more complex, perhaps none more so than the telecommunications market. Some commentators have labelled the telecommunications sector as a good example of a 'confusopoly'.[7] The complexity of the products in this market mean service providers may actively seek to increase information imbalance in order to make it harder for consumers to compare products, subsequently decreasing competition.

Consumers are subject to a number of behavioural biases. Behavioural economics is a particularly useful tool for analysing consumer choice. It combines insights from psychology with traditional economic models to more accurately reflect decision making by consumers and other economics agents.[8] Traditional models of markets assume economic agents, such as consumers, have an infinite capacity to take in and process information; are neutral to how it is presented; can anticipate and

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[2] ACMA, 2011, 'Reconnecting the Customer – Final public inquiry report', September 2011, p.3

[3] ACMA, 2011, 'Reconnecting the Customer – Final public inquiry report', September 2011, p.5

[4] TIO, 2014, 'TIO complaints – the year in review 2013-2014', p.5

[5] ACMA, 2011, 'Reconnecting the Customer – Final public inquiry report', September 2011, p.3

[6] Communications Alliance, 2014, 'Customer information provision policy framework', May 2014, p.6

[7] Gans, J., 2010, 'Breaking Up the Retail-Price Confusopoly', *Harvard Business Review* blog, 30 November 2010.

[8] Office of Fair Trading, 2010, 'What does Behavioural Economics mean for Competition Policy?', March 2010, p. 5

take the future into account; care only about self-maximising; and treat gains the same as losses.[9] In contrast, behavioural economics recognises that consumers have limits on the amount of information they can take in; are affected by presentation; tend to be poor at anticipating the future; care about people and fairness; and are more concerned about losses than gains.[10] These are known as 'behavioural biases'.

The great leap forward of the TCP Code in 2012 was its recognition of these consumer biases and the subsequent attempt to curb sales practices which sought to exploit them. Placing restrictions on confusing terms such as 'cap', 'unlimited' and 'free', backed up by an appropriate enforcement regime saw a number of these terms begin to disappear from the market.

Enforcement

The removal of the Chapter 4 obligations takes the ACMA out of the enforcement regime in relation to the bulk of sales and advertising practices. One effect of removing the ACMA from oversight means the ACCC is solely responsible for consumer protection. While ACCAN acknowledges that the ACCC is an effective regulator and enforcer of consumer protection, we must also acknowledge the complementary role that the ACMA has played in Code compliance. Given that the role of the ACCC in enforcing the ACL has remained constant over the lifespan of the Code we must attribute many of the measurable gains in reduced TIO complaints to the ACMA and Communications Compliance.

Industry has argued that the clauses within Chapter 4 can be picked up by an unenforceable guideline without any diminution in compliance. The 'soft power' of an enforceable code should not be underestimated. As the ACMA's Compliance and Enforcement Policy states, the ACMA seeks to:

- *foster industry compliance with, and contribution to, the regulatory framework without imposing undue financial or administrative burdens*
- *encourage a compliance culture within the communications and media sector and adherence to regulatory obligations*
- *promote a communications and media sector that is respectful of community standards and diligent in responding to community complaints.*[11]

Along with the ACMA's careful graduated response approach, this is a scheme which places an emphasis on guiding and educating industry towards positive outcomes. This approach aims to create lasting cultural change in the telecommunications industry.

The Code provisions are also designed to be specific and relatively easy to comprehend. They outline obligations which would otherwise require an understanding of a number of pieces of legislation and a plethora of case law. This can be a costly exercise; disproportionately so for small and medium size suppliers. Removing either enforceability or the ACMA's role in guiding compliance will not just risk adverse outcomes for consumers, but is likely to dramatically increase overall compliance costs, especially if the advertising and sales practice Chapter is removed so soon after its introduction.

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[9] Office of Fair Trading, 2010, 'What does Behavioural Economics mean for Competition Policy?', March 2010, p. 5

[10] Office of Fair Trading, 2010, 'What does Behavioural Economics mean for Competition Policy?', March 2010, p. 5

[11] ACMA, 2010, 'ACMA compliance and enforcement policy', August 2010, p.2

We will now move on to consider the individual amendments. Note that given the large number of amendments ACCAN makes its comments by exception.

ACCAN comments on specific clauses

Chapter 3 – General Rules

3.2.1: We agree that it is good to add a general clause here to remove repetition throughout the Code. One element which has been deleted in other sections and not brought into this section is the concept of 'informed choice'. Given 'informed choice' is the overarching goal of this clause we believe the clause would be enhanced by specific mention.

Recommendation: Reinsert the concept of informed choice into the Code via clause 3.2.1.

3.3.2 [Original]: We recognise that the 'Disability Matters' Guideline has been removed from publication. However the content of the Guideline, which focusses on developing accessible documents, has been moved to the CA website.[12] As part of our member consultation we received feedback that most of the documents on the CA website are not provided in an accessible format, including the current TCP Code proposals. We are therefore concerned that losing reference to information about document accessibility will further undermine a commitment to making information accessible.

Recommendation: The original clause 3.3.2 should be retained and either reference the information published on the Communications Alliance website or equivalent.

3.3.2 [CA proposed]: Further consideration of the adequacy of this section should be given in light of the concerns about website information listed below.

Website information

In general we are not concerned by the removal of clauses which genuinely duplicate clause 3.3.2. However, the wording of this clause does not capture the range of situations where Suppliers are currently obliged to make information available on a website.

Clause 3.3.2 only requires a Supplier provide "relevant terms and conditions of its Telecommunications Products from a website". This does not replace website information which is not a relevant term or condition of a Telecommunications Product. We would be particularly concerned if it meant information, such as 'Hardship policies', were not required to be provided online.

Clause 3.3.2 also requires consideration of what is a '*relevant* term and condition'. Without guidance there is very little direction throughout the Code on what a Supplier should consider relevant. The addition of a subjective consideration as to what is *relevant* creates a risk that the quality of easy to access information online will decrease. As the RTC Report pointed out, a hallmark of the telecommunications industry was not easy access to clear information. So there is significant risk of returning to this situation if these positive changes are wound back.

[12] http://www.commsalliance.com.au/Standards-GuidanceDevelopingDocuments

This is problematic for all consumers, particularly so from an accessibility point of view. Different communications needs mean people with a disability are often reliant on websites as a primary source of information. Without prescription it is likely information outside of the bare essentials will be provided in an accessible format.

ACCAN's Mystery Disability Shopping research indicated that knowledge about accessible telecommunications products and services by customer service and sales staff was very poor.[13] We believe it is vitally important that the primary source of information remain online.

Consumers without easy access to a telecommunications retail outlet are also likely to face barriers in accessing information if it is not provided online. This is also a common experience for rural and remote consumers who may have to travel to major towns to access this type of information.

Recommendation: Broaden the requirement that information be made available on websites so that it is inclusive of information requirements such as those currently found in clauses 4.1.2, 4.4.2 and 6.11.

3.3.3 [CA proposed]: Given the issues already identified with regard to the accessibility of information we believe it is important Suppliers *have regard* to the current version of the Web Content Accessibility Guidelines (currently version 2.0). Version 2.0 has been the current version since 2009, before the registration of the current Code, so should have been included in the last update. Given this section only requires Suppliers 'have regard' to the WCAG we do not believe it is onerous to include mention of the WCAG industry best practice baseline of "AA" in this clause.

Recommendation: Update reference in 3.3.3 to WCAG 2.0 and include reference to the "AA" baseline.

Chapter 4 – Consumer sales, service and contracts

4.1.2(e): This clause has been removed because it supposedly duplicates clause 4.1.4(c) (new 4.1.3(c)). This remaining provision is a requirement specific to a consumer who has identified a need, rather than the general information requirement expressed in 4.1.2(e). For example the deleted clause obliged providers to make usage information available to everyone via its website. The retained provision only obliges a customer to be given this information if they identify a need. In practice it may mean this information won't be provided online and will only be proffered if a customer identifies a need to a sales representative. The customer will then be entirely reliant on the training of the individual salesperson, a generally weaker source or information, than a website laying out this information.

Recommendation: Reject amendment to clause 4.1.2(e) - information must be available on websites as a primary source.

4.1.2(f): This clause does not duplicate ACL s51-63 as stated in the reasoning for its removal. Warranties are voluntary promises offered by a provider. Guarantees are mandatory statutory

[13] ACCAN, 2014, 'ACCAN's Disability Mystery Shopping Report', available at: https://accan.org.au/our-work/submissions/953-accan-s-disability-mystery-shopping-report

obligations, such as the guarantee as to acceptable quality. Section 59 of the ACL elevates an express warranty to the level of a guarantee for the purposes of remedy. However this section of the Code is directed at informing a consumer about the *details* of a warranty and references to a Consumers' entitlements under the CCA. In contrast the ACL creates a protection, not an information requirement. For example, the Code obligation may require a Supplier to express a warranty in the following terms "Not excluding anything under Australian Consumer Law there is a 3 year warranty over this device". A consumer seeking warranty information is likely to go to the supplier offering the device. By removing this information some consumers may be left unaware of their rights under the warranty and how that right interacts with consumer guarantees under the Australian Consumer Law.

We maintain that this level of explanation may be required to improve compliance and understanding of the ACL among telecommunications Suppliers. The ACCC recently investigated Telstra after it appeared it may have misled consumers about their guarantee rights in relation to faulty mobile phones.[14] Telstra acknowledged the ACCC's concerns and took corrective action. Code provisions like this can provide an important educative role to guide compliance with ACL for both small and large Suppliers.

Recommendation: Reject amendment to clause 4.1.2(f). If providers are going to offer warranties then consumers should have access to information about those warranties.

4.2 Advertising: Generally this section attempts to codify some of the case law which has developed around the misleading or deceptive conduct provisions in the Australian Consumer Law.

One important area which may be at risk if this section is removed is the restriction on the use of the word "cap". The ACCC have taken enforcement action against Optus for misleading use of the word. However, there does not appear to be any case law specifically confining its use, so it may be open to a provider to litigate on this issue. Nor was specific guidance on the use of the term "cap" placed in the Communications Alliance produced Guidance Note.

Communications Alliance has created a Guidance Note to cover these codified advertising obligations. As outlined in the 'Role of the TCP Code' section of ACCAN's submission this approach is concerning from compliance and enforcement perspectives. Firstly, reducing Code requirements to a Guidance Note removes the ACMA from its enforcement role. We believe the complementary role the ACMA has played to the ACCC's consumer protection role has struck the right balance in developing appropriate consumer safeguards. Importantly, under the ACMA's stewardship complaints to the TIO have decreased.

Secondly, removing these obligations from the Code would take away the role of Communications Compliance in checking advertising compliance. We believe that, albeit with limit resources, this organisation has been particularly effective in working with industry to create a culture of compliance.

Another concern is the existence of some Communications Alliance Guidelines behind a paywall which is not accessible to non-members. As a voluntary member organisation Communications

[14] ACCC, 2014, 'Telstra commits to improving its compliance with the Australian Consumer Law', available at: http://www.accc.gov.au/media-release/telstra-commits-to-improving-its-compliance-with-the-australian-consumer-law

Alliance does not represent all of industry, meaning large non-members like TPG and a multitude of smaller providers would not be guaranteed access to the guidance or future updates as the case law evolves. If smaller providers are forced to undertake more compliance checking, overall costs across industry are likely to increase, while overall compliance may decrease.

ACCAN analysed the current advertising standards under the Code and the equivalent ACL case law. We found that in a number of instances the TCP Code covered areas which were not adequately captured in case law. In instances where the case law provided some guidance the judgement often turned on the specific facts of the case. We are concerned that replacing best practice codified obligations with a potentially endless array of case law risks increasing compliance costs and decreasing overall levels of compliance.

Recommendation: Reject amendment to clause 4.2.

4.2.5 Compliance process: This clause sets out an internal compliance regime for the advertising obligations which are proposed to be removed. It has been removed in accordance with the Framework which stipulates that requirements should be principles and outcomes-based, therefore the level of prescription is unwarranted. In line with the objectives of the Framework we believe there is some merit in keeping the principle contained in the first paragraph, but removing the prescription in clause 4.2.5(a)-(e).

Recommendation: Keep principle/outcome in first paragraph and remove detail in clause 4.2.5(a)-(e).

4.3.2 Accurate descriptions of products

4.3.2: This clause creates positive obligations on suppliers to train sales representatives and provide consumers access to product information. This clause gives some broad principles such as being comprehensible, truthful, without exaggeration or omission of key information.

The stated reason for amendment is that the clause duplicates section 29 of the ACL. Section 29 is framed in the negative, listing a number of prohibited false or misleading representations. In contrast the Code is framed in the positive, creating an obligation to communicate key information that is reasonably likely to be important to a consumer in reaching a purchasing decision. The Code provision is an extra layer of protection. This is particularly important in telecommunications where rapidly changing technology means consumers are dealing with a constantly evolving array of products and services. As such, without the aid of sales representatives, a consumer may be unaware of the key product information that should be guiding their purchase. For example, a consumer wishing to purchase a new phone with 4G capability should be made aware that this technology may only work in certain coverage areas. This clause would oblige Suppliers to undertake a positive role in providing this type of information.

Recommendation: Reject amendment to clause 4.3.2, this obligation is not contained in the ACL provision.

4.3.3 Appropriate behaviour

4.3.3: This clause appears to duplicate 3.4.1. Some reference is made to this section also duplicating the ACL. In reality it aims to ensure internal practices are developed to manage specific staff behaviour. However we understand that how a Supplier manages its staff is a process which should be left to each provider.

Recommendation: Accept amendment.

4.3.4 Consent

4.3.4: The stated reason for removal is that this clause duplicates the ACL. This is not strictly correct. The Code creates positive requirements which if followed may be later used as evidence that a contract was not vitiated either under contract law or the ACL. Failure to follow this provision may open up providers to claims of unconscionable conduct. This clause may aid compliance with broader legal obligations rather than duplicate them.

Recommendation: Reject amendment to clause 4.3.4

4.3.5 Promoting Transfers

4.3.5: The majority of this clause has been moved to 7.1.1. Provisions 4.3.5 (b) and (d) are proposed to be removed because they duplicate the ACL. Clause (d) gives specific guidance on conduct which has been interpreted to be misleading or deceptive conduct under the ACL (e.g. telemarketing calls promoting transfers purportedly from Telstra). This codified approach enhances compliance with the ACL by giving clarity as to what would be considered misleading in a telecommunications context. This clause was inserted over and above the ACL to deal with a recognised deficit in telecommunications provider sales practices.

Recommendation: Accept removal of 4.3.5(b). Reject the removal of 4.3.5(d).

4.3.6 Recording calls

4.3.6: This clause directs a supplier to inform consumers about recording phone calls. Leaving the provision in place may aid compliance with the Privacy Act and the TIA Act. ACCAN believes this section should be reviewed in light of the 'Participant Monitoring' Guideline.

Recommendation: Review the amendment to clause 4.3.6 in light of *G516:2014 Participant Monitoring of Voice Communications.*

4.4.2 Consumers with disabilities

4.4.2: As already mentioned clause 3.3.3 does not necessarily create a requirement that all substantive information is made available on a website or via a contact number or email address. If this information is not provided on the website consumers may be reliant on sales staff. ACCAN research discovered very low rates of knowledge about products for people with a disability among these sales representatives. So this is likely a poor substitute for the information residing online.

Recommendation: Reject the removal of the requirement to place information on a website in clause 4.4.2(b). Accept other amendments.

4.5.3 Unfair Terms

4.5.3: This clause purportedly duplicates sections 23 and 25(1) of the ACL. While section 25(1) of the ACL gives some detail of particular terms which are likely to be unfair contract terms the Code puts them into a telecommunications context. For example, the suspension of service Code clause 4.5.3(a) directs suppliers not to include terms which:

(a) *Suspension of service: permit the Supplier to indefinitely suspend all Telecommunication Services because of the Supplier's error or failure, or to charge the Customer a reconnection fee for a suspension caused by the Supplier's error or failure;*

This provides specific guidance on two broader ACL provisions which state unfair terms to be:

(a) *a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;*
(c) *a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;*

Again these Code clauses give specific guidance to Suppliers and are likely to enhance compliance with the consumer law. From a compliance perspective assessment of what is likely to be an unfair term can be a lengthy complicated process for business. An attempt to mitigate compliance costs is why a non-exhaustive list of unfair terms was placed in the ACL. Giving specific guidance to telecommunications providers is likely to further save costs across the sector.

ACCAN commissioned a piece of fine print research which identified a number of unfair contract terms in telecommunications contracts. We used this research to directly engage with providers to help improve compliance in what can be a complex area of law. Upon being alerted to the possible breaches many providers were happy to make changes to their contracts. This highlighted the willingness of industry to comply but the difficulty in fully understanding obligations under the ACL. In this case the Code plays an important role in explaining broader obligations under the consumer law.

Removing this clause would also impact small business. Currently unfair contract term protections only apply to individuals, not to small business. This section expands protection to small business that it would not otherwise receive under the ACL.

Recommendation: Reject the amendment to clause 4.5.3.

4.6.3 Personal information

4.6.3: This section needs to me amended to reflect its intention, which is to extend privacy protections to businesses that would otherwise be exempt. A reference to 'applicable' privacy laws defeats its purpose as these laws do not apply to these businesses. The line "…compliance with all *applicable* privacy laws" should be replaced with "…compliance with all *other* privacy laws."

Recommendation: Amend clause 4.6.3 in line with above.

4.6.4 Customer Service Charter

4.6.4: As a voluntary obligation ACCAN has identified that this section does not provide protection to consumers, nor has it been adequately utilised by Suppliers. While possibly a good idea, its existence in the Code or otherwise does not stop Customer Service Charters from being adopted independently. As such we propose it be removed from the Code.

Recommendation: Remove clause 4.6.4.

Chapter 6 – Credit and Debt Management

6.2 Responsible provision of Telecommunications Products

6.2.1 (b) The reason for this amendment is incorrect. This clause is an information requirement in relation to a Credit Assessment. A Credit Assessment "means the process by which a Supplier determines the level of credit to provide by it (if any) to a Consumer". It is far broader than a credit check with a Credit Reporting Agency to which the Privacy Act and CR Code obligations apply. Consumers should be informed of the general nature and effect of a Credit Assessment so that they are aware of the basis on which a decision to give credit is formed.

6.2.1(c) The amendment also removes the obligation to provide *written* advice to a Guarantor in situations where a Guarantee is required. Providing a guarantee means a guarantor enters into a legal relationship with the supplier and makes them liable for costs accrued under the contract. It is good practice for this to be in writing so that all parties are aware of their obligations. This section was designed to meet a specific problem whereby Consumers were unknowingly becoming Guarantors for friends or family and were therefore not aware of the legal and cost repercussions.

Recommendation: Reject amendments to clauses 6.2.1(b) and (c).

6.3 Provision of information where service is Restricted at the time of application

6.3(c): The amendment removes the requirement for information to be provided "upon request" in writing. Again it is good practice for this information to be provided in writing, especially if requested. This takes account of the different needs of consumers, for example consumers with hearing difficulties. Also the section is worded so that the written information only has to be provided "upon request", this is not prescriptive as it is meeting an identified need. The customer-centric design of the Framework clearly stipulates that information requirements need to be delivered in a way which is useful to customers. Therefore, clauses which are aimed at meeting the needs of consumer requests should not be removed.

Recommendation: Reject amendment to clause 6.3(c).

6.4 Security Deposit

6.4.1(c): This amendment removes the requirement to provide *written* advice on the repayment and interest arrangements on a security deposit paid by a consumer. Again it is good practice for this information to be provided in writing, especially if requested. This takes account of the different needs of consumers, for example consumers with hearing difficulties. It may also be a breach of law not to provide this information in writing. Its omission may be seen as encouraging providers to breach their legal obligations.

Recommendation: Reject amendment to clause 6.4.1(c).

6.8 Fair Credit Management process

6.8 (f) Default listed in error

6.8(f): This amendment is an attempt to lessen the standard set in the Code from informing a Credit Reporting Body of a default listed in error within 1 Day to 'use reasonable endeavours' to inform

within 1 day. The CR Code stipulates within 30 days or 'reasonable' timeframes. Given the regularity with which the telecommunications industry makes default listings and the scale of the impact the default listing can have on a consumer, it is reasonable for this industry to maintain the strict 1 working day obligation. This amendment is also beyond scope of the current review as it does not involve a consumer information requirement.

Recommendation: Reject amendment to clause 6.8(f).

6.8 (g) Updates to Credit Reporting Agencies

6.8(g): This clause directs Suppliers to their obligations under the Privacy Act and associated codes and regulation. General compliance standards are likely to be higher when all obligations or references to obligations are contained in a single document. The Privacy Act does apply to small business operators who are credit providers. However the general provisions of the Privacy Act must be read in their entirety to understand this obligation.[15] Much OAIC information also lacks clarity and could lead small businesses to believe they are not covered by the Privacy Act.[16] Without the explicit direction of the Code there may be poor levels of compliance or the need for costly legal advice. Again this goes to the important role code plays in explaining broader obligations.

Recommendation: Reject amendment to clause 6.8(g).

6.10 Debt collection

6.10: The introduction and subclause 6.10(a) refer the reader back to compliance with other sections of the Code, guidelines and legal obligations. Subclauses 6.10(b) and (c) remain important as they give legal status to two consumer protection guidelines which would otherwise be unenforceable. We note these two guidelines have since been updated to:

- 'Don't take advantage of disadvantage: a compliance guide for businesses dealing with disadvantaged or vulnerable consumers when collecting amounts due' (11 March 2011)[17]
- ASIC's 'Revised Debt Collection Guidelines' (July 2014)[18]

Retaining this information will improve overall compliance with the Code and other obligations, particularly for smaller providers who are likely to use the TCP Code as a central repository for guidance and tracking obligations.

Recommendation: Accept removal of subclause 6.10(a) reject removal of subclauses 6.10(b) and (c) and update to latest versions.

6.11 Financial Hardship policy

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[15] *Privacy Act* s6G(1)(b)(ii)

[16] http://www.oaic.gov.au/privacy/privacy-topics/business-and-small-business/small-business

[17] https://www.accc.gov.au/publications/business-snapshot/dont-take-advantage-of-disadvantage

[18] https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors

6.11: This clause removes all references to information being made available on the Supplier's website. This is a backwards step in industry best practice. In the banking sector this information is available within one click of the landing page. There is increasing awareness among responsible industry players that a clear and visible financial hardship policy actually improves relationships with customers and can lead to improved probability of costs being recouped in the long term. This amendment is a backwards step.

Recommendation: Reject amendments in clauses 6.11.1 (a), (b) and (c).

6.13 Communication of Financial Hardship arrangements

6.13: Subclause 6.13(a) removes the requirement that Financial Hardship arrangement details are provided to a Customer *on request* in writing and through *any other means agreed* by the parties. Again it is best practice that this information is provided in writing (noting that this could be by email). People experiencing financial hardship are likely to be in very difficult circumstances where non-compliance with these arrangements could have serious legal and credit repercussions. Financial hardship often causes high levels of stress and anxiety. At these times simply being given information in verbal form is likely to lead to poor retention of information. Also rather than being prescriptive this clause is expressed in terms such as "on request" and "through any other means agreed". These terms are responsive to a Customer's identified need are in line with the Framework.

Recommendation: Reject amendment to subclause 6.13(a).

Chapter 8 – Complaint Handling

Summary

This reference to the Australian Standard – Complaint Handling (AS ISO 10002 2006) should not be removed on the basis that it is currently being revised. The revised version (AS ISO 10002 2012) has been published and should be included in the old version's place. Telecommunications complaint handling processes should strive to meet best practice under the Australian Standard; this is more likely to be achieved where there is reference to the Standard.

Recommendation: Update to amend to version Australian Standard – Complaint Handling (AS ISO 10002 2012).

Conclusion

ACCAN would like to acknowledge the significant effort by Communications Alliance's Working Committee WC61. Although we approached this submission by exception there were a large number of amendments which we believe will be positive for industry and consumers through further streamlined and simplified obligations.

We are particularly concerned by moves which ignore the lessons learned as part of Reconnecting the Customer. Quality, accurate information at the advertising and sales stage of the customer lifecycle mitigates against future complaints and dissatisfaction. Recognising the key role the internet plays in guiding consumer choice it is also important that this information is provided in detail online.

It is important to recognise the role the TCP code plays in explaining broader obligations. Without it compliance can become onerous as business seeks to grapple with often complex legal interpretation spread across legislation and case law. Reducing these obligations to unenforceable guidelines can send the wrong message to some sections of industry while others may find their costs of compliance increase as obligations become more diffuse. Meanwhile it is consumers who bear the cost of non-compliance with the real risk that sections of the industry return to the sharp detrimental practice which was more common prior to the Code's introduction.

Appendix A. Operations codes

Customer information requirements

ACCAN is concerned by the removal of customer information requirements under:

- Mobile Number Portability Industry Code
- ULLS Ordering, Provisioning and Customer Transfer Code

ACCAN is concerned that obligations to inform Customers prior to the agreement to transfer a service have been removed from enforceable codes and placed into an unenforceable guideline. When Customers are moving Supplier there is strong incentive for a Supplier not to inform the Customer of matters which may dissuade them from completing the move. Factors such as early termination fees, the compatibility of handsets or significant delays in transfer are all vital considerations for an informed Customer at that stage in the lifecycle. Not being aware of these fees at this crucial time can lead to significant consumer detriment. For example, early-termination fees can run into the thousands of dollars. Alternatively a significant delay in transfer is likely to be vital to the decision making for a customer requiring continuity of service for whatever reason. These amendments runs counter to the customer-centric principles of the Framework and are likely to see Customers unaware of their obligations and other important issues when moving supplier.

Recommendations:

- Reject removal of clause 4.2 of the Mobile Number Portability Industry Code
- Reject removal of clause 5.7 of the ULLS Ordering, Provisioning and Customer Transfer Code

Calling cards – (Emergency Call Service Requirements Code – clause 4.5.6)

We do not support the removal of clause 4.5.6 of the Emergency Call Service Requirement Code on the basis that it is covered in the CA Prepaid Calling Card Guideline. This change will mean a reduction in the level of protection for calling cards users because this guideline clause will not be enforceable by the ACMA. As it currently stands the code is not overly prescriptive and meets the principles of the Framework because call card providers are only required to “take reasonable steps” in “a manner which promotes awareness.”

It is however vitally important that information about emergency services is readily available to card users. This is especially the case because this information is even less likely to be known by consumers from overseas who may only be in Australia for a short stay.

We are also concerned because there have been significant examples in the past of prepaid calling card providers not making information available to consumers. The ACCC has initiated and won three federal court cases against pre-paid calling card providers for misleading and deceptive

advertising.[19] We believe a code rule is required to ensure the ACMA can take action, if required to ensure information about emergency services is made available by call card providers.

Recommendation: Reject the deletion of clause 4.5.6 of the Emergency Call Service Requirement Code.

Status of the Industry Guideline DR G651:2014 Customer Authorisation

ACCAN agrees with the intent of the Guideline's 'Introductory Statement'. The Guideline represents significant streamlining and simplifying of CSP obligations by placing the requirements currently spread across a number of codes into a single document. We also agree that the approach to information provision should focus on outcomes rather than process. It should also be flexible enough to ensure customers are provided information in a time and way that makes sense to the provider and customer. The Guideline rightly identifies that the point prior to completion of a transfer is the very time when a customer wants to be made aware of this information.

ACCAN believes there is significant risk for providers and customers if the obligations in this Guideline are not followed. Customers who are not adequately informed of obligations under existing arrangements may incur significant expense and inconvenience as a result of a transfer. This may also damage losing service providers who would not have lost a customer if that customer had been fully aware of their situation. We believe there should be restrictions in place to prevent the type of sales practice which relies on uninformed consumers. We strongly recommend this Guideline be elevated to the status of code. This will achieve the goal of removing duplication without downgrading code requirements.

Recommendation: Alternate to the recommendations to keep customer information provisions in separate codes as stated above – that the Industry Guideline DR G651:2014 Customer Authorisation becomes a registered industry code.

Content of Customer Authorisations

Unlike the Codes which this Guideline replaces there is no requirement in the Content of the CA that Suppliers gain acknowledgement that a customer has been advised of the consequences of changing provider (eg: early termination fees, handset compatibility, etc.). Without placing this requirement in the 'Authorisation Content' provisions Suppliers attempting to engage in best practice will not be able to check that they have been adequately informing Customers about their obligations under existing arrangements.

Recommendation: Insert a requirement in clause 5.1 that a CA contain acknowledgement that a GSP has informed a Customer about the consequences under an existing agreement.

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[19] *Australian Competition & Consumer Commission v Boost Tel Pty Ltd and Prepaid Services PTY Limited* (2009), *Australian Competition & Consumer Commission v Tel.Pacific Limited* (2009) and *Australian Competition & Consumer Commission v Cardcall Pty Ltd* (2009)

Authorised Representative

ACCAN is concerned about the implication of using the term Authorised Representative in clause 4.1 – point 3. Having a GSP act as an Authorised Representative in the broader sense would be completely inappropriate. This is a relationship of trust usually reserved for a friend or family member, not a Service Provider. Delegation of authorised rights necessary to carry out a transfer should not be conflated with the defined term Authorised Representative.

Recommendation: Delegation of authorised rights necessary to carry out a transfer should not be conflated with the defined term Authorised Representative.