



Review of the Telecommunications Consumer Protections Code

ACCC submission

June 2023

1. Introduction

The ACCC and the Australian Consumer Law

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. The ACL 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.

Telecommunications-specific protections are vital

Telecommunications services are essential. They support a vast range of access to Government services, work, business, education, health, and entertainment needs. Because of this essential status, businesses operating in the telecommunications industry are subject not just to the economy-wide provisions set out in the ACL, but also to industry specific obligations, including the TCP Code.

The TCP Code sets out that it is designed to ensure that telecommunications suppliers:

- engage in open, honest and fair dealings with consumers
- provide clear, accurate, and relevant information on products and services
- do not engage in misleading conduct when promoting products and services
- resolve disputes quickly and fairly when they occur, and offer effective remedies to affected consumers
- embed policies and practices that protect vulnerable consumers.

The TCP Code is drafted by members of the Communications Alliance, that is, members of the telecommunications industry. It is registered by the Australian Communications and Media Authority (ACMA),¹ who are also responsible for with enforcing Code compliance.

The TCP Code and ACL overlap in a number of respects. We have previously argued that an effective regulatory strategy which is designed to protect consumers should be structured not only to address harmful conduct after it occurs but also to proactively prevent harm to consumers.² We considered this could be achieved by setting out industry-specific rules for compliance through frameworks like the TCP Code, which are designed to sit beside the ACL, and through which compliance with the specific measures will often assist a business to ensure their conduct is also compliant with the ACL.

However, more than a decade has now passed since the introduction of the TCP Code. We are disappointed that overall consumer complaints relating to telecommunications suppliers remain very high, with more than 1 million reported in 2021-22.³ Further, the ACCC is still

¹ Subject to provisions under section 117 of the *Telecommunications Act 1997* that the ACMA is satisfied that the Code provides appropriate community safeguards and that certain consultation processes have been followed.

² ACCC, *ACCC submission on the draft revised Telecommunications Consumer Protections Industry Code*, November 2014.

regularly witnessing – and taking enforcement action against – serious breaches of the ACL by telecommunications suppliers.⁴ This includes a number of actions taken by the ACCC in response to misleading and deceptive conduct, as well as in response to unconscionable conduct. A summary of these actions is set out in Appendix A.

The ACMA has also taken action in response to a number of TCP Code breaches in recent years, including breaches of provisions designed to protect consumers identified as being in financial hardship,⁵ as well as failures to appropriately train staff in relation to financial hardship.⁶ We also note the 2023 research which found that consumers consider telecommunications to be the most distrusted industry in Australia.⁷

In combination, these factors suggest that a consistent and widespread compliance culture is lacking across the telecommunications sector, and that much more needs to be done to protect consumers.

We re-emphasise, as we have previously raised,⁸ the issue that ACMA's powers in enforcing industry codes are constrained by a cumbersome two-step enforcement process. Further, the ACMA's powers to accept the TCP Code or seek improvements to the operation and coverage of the Code are rigid and indirect, and do not provide the ACMA with any power to review the Code to ensure that it remains fit for purpose.

The ACMA is also constrained by very low financial penalties available to them when pursuing a breach of an industry code.⁹ Consequently, the incentives for industry participants to mislead or deceive consumers, or make misrepresentations about the quality or coverage of networks, are higher than the incentives to comply with the Code.

The regulatory framework must be strengthened

We consider it vital that telecommunications consumer protections are strengthened, to reflect the essential nature of telecommunications services, and promote a competitive and well-functioning market. These protections must address and prevent the ongoing misconduct we are witnessing by telecommunications suppliers.

Further, they must complement or enhance, rather than repeat, paraphrase or derogate from or limit in any way, existing legal obligations such as those under the *Competition and Consumer Act 2010* which includes the Australian Consumer Law, as well as other telecommunications regulatory regimes.

In this submission we set out a number of issues we have heard from stakeholders regarding the operation of current provisions of the TCP Code. We first discuss issues which particularly affect consumers experiencing vulnerability, before discussing issues which may affect all telecommunications consumers across Australia. We consider that effective

³ ACMA, *Telco complaints-handling performance 2021-22*, <https://www.acma.gov.au/publications/2022-10/report/telco-complaints-handling-performance>.

⁴ Including in excess of 2000 complaints about misleading or deceptive conduct by telecommunications suppliers in each of the 2020-21 and 2021-22 financial years: ACCC, *Communications Market Report 2021-22*, https://www.accc.gov.au/system/files/22-71RPT_Communications%20Market%20Report_FA.pdf, December 2022.

⁵ ACMA, Direction under subsection 121(1) of the *Telecommunications Act 1997* to Telstra Corporation Limited, https://www.acma.gov.au/sites/default/files/2022-11/direction_to_telstra_corporation_limited.pdf, August 2022.

⁶ ACMA, Investigation Report into Southern Phone Company Limited, https://www.acma.gov.au/sites/default/files/2022-01/Investigation%20report%20-%20Southern%20Phone%20Company%20-%20December%202021_0.PDF, December 2021

⁷ Roy Morgan Single Source (Australia). *Risk Monitor*, 12 month average to February 2023.

⁸ ACCC submission to Part C of the Consumer Safeguards Review, <https://www.accc.gov.au/system/files/ACCC%20submission%20to%20Part%20C%20of%20the%20Consumer%20Safeguards%20Review%20-%20September%202020.pdf>, September 2020.

⁹ Including a maximum penalty of \$250,000 for breach of an industry code: Section 570 of the *Telecommunications Act 1997*.

protections must be put in place, with sufficient strength, clarity and enforceability, to mitigate or eliminate the identified issues.

However, based on ongoing industry non-compliance, the fact that the Code is drafted by industry itself, and the above-described ways that the ACMA is stymied in its ability to enforce or improve the TCP Code, the ACCC is not confident that this Code review process will result in beneficial outcomes for consumers.

The ACCC would support the exploration of other regulatory solutions. These could include setting out telecommunications consumer protections in an industry Standard, or through the introduction of a new service provider determination. We would strongly support the ACMA in pursuing these types of options, as we did when the ACMA elevated the complaints handling rules from the TCP Code into the Telecommunications (Consumer Complaints Handling) Industry Standard 2018.

2. Issues affecting consumers experiencing vulnerability

The ACCC has identified the following issues with the current TCP Code which particularly affect consumers experiencing vulnerability:

- the current definition of financial hardship
- the lack of requirement for early identification of consumers experiencing hardship
- the lack of fee-free bill payment options
- the unenforceable protections for consumers experiencing family violence

This section sets out the ACCC's views on each of these issues in turn.

Issues with the definition of financial hardship

Consumers and small businesses across Australia are currently facing acute cost of living pressures.¹⁰ These pressures tend to exacerbate existing consumer experiences of vulnerability, such as low income, underemployment or unemployment, experiences of family violence, and lived experience of illness, disability, or mental health issues.

In light of this, the ACCC considers the continued inclusion of financial hardship provisions within the TCP Code is essential. However, we see a significant gap in the existing definition of financial hardship in section 2.1 of the TCP Code, which currently encompasses:

a situation where a customer is unable to discharge the[ir] financial obligations ... due to illness, unemployment, being the victim of domestic or family violence, or other reasonable temporary or ongoing cause; and

the customer believes that they are able to discharge those obligations if the relevant payment arrangements or other arrangements relating to the supply of telecommunications products by the supplier to the customer are changed.

¹⁰ ACOSS, *Helping people in need during a cost-of-living crisis: Findings from the Australian Community Sector Survey*, <https://www.acoss.org.au/helping-people-in-need-during-a-cost-of-living-crisis-findings-from-the-australian-community-sector-survey/>, December 2022.

We note this definition does not include low income as a cause of hardship. According to the Australian Council of Social Service (ACOSS), 13.4% of Australians live below the poverty line,¹¹ which is likely to have a significant effect on a consumer's ability to manage their financial commitments. Further, the Australian Communications Consumer Action Network (ACCAN) found that 1 in 5 Australians have recently missed a payment for a phone or internet service because they could not afford it,¹² and the ACMA found that 48% of surveyed consumers recently had difficulty with their telecommunications bills.¹³

However, because low income is not included in the definition of financial hardship, the benefits currently afforded to consumers in financial hardship, including low-cost options, payment plans, and shaping, are not currently available to low-income consumers.

No requirement for early identification of consumers experiencing hardship

At present, the financial hardship provisions under the TCP Code set out the requirement that telecommunications suppliers have a hardship policy, and that this policy must be easy for consumers to find and access. While the Code requires suppliers to advise consumers of the existence of the hardship policy in the course of sending a reminder notice, there is no further obligation that suppliers proactively identify consumers who need support.

Research has found that identifying and providing early assistance to consumers experiencing payment difficulty can maximise outcomes by preventing debt spirals from occurring.¹⁴ However, the ACMA has found that only 57% of the general Australian adult population and 64% of those who experienced a financial hardship situation in the past 12 months were aware they could contact their telecommunications supplier to request help managing the payment of bills due to financial difficulties.¹⁵ Further, the ACMA found that it was rare for telecommunications suppliers to initiate contact with consumers to offer advice or assistance.¹⁶

Further, the Code does not require consideration of any common indicators of financial hardship,¹⁷ nor any requirement that suppliers consider these indicators to mean that a consumer may be in need of hardship support. We see this is as strongly preferable to relying on a consumer to self-identify as being in need.

The Code also lacks any requirement that when dealing with a consumer in financial hardship, suppliers must consider whether the consumer is on the best plan for their circumstances, including assessing whether the consumer is eligible to receive an ongoing

¹¹ ACOSS, *Poverty in Australia*, <https://povertyandinequality.acoss.org.au/poverty/#poverty-australia>.

¹² ACCAN, *1 in 5 Australians struggling to pay a telco bill*, <https://accan.org.au/media-centre/media-releases/2075-1-in-5-australians-struggling-to-pay-a-telco-bill>, 21 March 2023.

¹³ ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

¹⁴ Essential Services Commission (Victoria), *Supporting Customers, Avoiding Labels: Energy Hardship Inquiry Final Report*, <https://www.esc.vic.gov.au/sites/default/files/documents/Energy-Hardship-Inquiry-Final-Report-February-2016-1.pdf> February 2016, pp. 32 and 41

¹⁵ ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

¹⁶ ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

¹⁷ Such as multiple late or missed payments, or requests for payment extensions, or entitlement to a concession.

or long-term lower cost offer due to holding a relevant concession card such as a healthcare card, a student card, or a seniors card.

Lack of fee-free bill payment options

At present, the TCP Code requires telecommunications suppliers to offer consumers one payment method free of charge. The fee-free option is often direct debit, while fees for other payment methods are often passed on to the consumer.

ACCAN and the Public Information Advocacy Centre (PIAC) have recently published research which found that consumers experiencing vulnerability may be unable to utilise the fee-free option.¹⁸ For example, ACCAN and PIAC found that 28% of First Nations consumers, 22% of consumers living with disability, and 15% of low-income consumers do not find direct debit to be an easy method for paying their telecommunications bills. In addition, older Australians and unemployed consumers are more likely to have never used direct debit services.

Further, for consumers experiencing significant financial hardship, ACCAN and PIAC found that community service providers are concerned with the timing of direct debit payments.¹⁹ According to the service providers, direct debit payments which do not coincide with consumers' income can result in late fees or dishonour fees, which ultimately contribute to further financial hardship. ACCAN and PIAC also found that some consumers are charged additional fees as a result of late payments which occur due to processing delays rather than actual late payments.

We therefore consider the limitations around fee-free payment options to be a significant issue with the current Code.

Unenforceable protections for consumers experiencing family violence

Family violence affects at least 1 in 6 Australian women, and can cause significant physical and financial harm.²⁰ We note that the TCP Code definition of hardship includes consumers experiencing family violence. However, the Code itself contains little direction for telecommunications suppliers in how to effectively support these consumers. Instead, the Code refers suppliers to the Communications Alliance publication, *Assisting Customers Experiencing Domestic and Family Violence Guideline*.

We note recent Telecommunications Industry Ombudsman's findings in relation to the support offered to consumers experiencing family violence:

- consumers can face barriers to getting help if their provider has inadequate processes for identifying and responding to consumers experiencing family violence
- remaining connected to phone and internet services is critical to consumers experiencing family violence, and that losing access to these services can have extreme consequences, including compromising consumers' safety and affecting their ability to communicate with their support network and other specialist services
- weaknesses in account security processes can lead to privacy risks

¹⁸ ACCAN, *ACCAN Research Snapshot: Direct Debit in Telecommunications*, <https://accan.org.au/files/Reports/ACCAN%20Research%20Snapshot%20-%20Direct%20Debit%20in%20Telecommunications.pdf>, April 2023.

¹⁹ This was also found by the ACMA, see: ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

²⁰ Consumer Policy Research Centre, *Exploring regulatory approaches to consumer vulnerability*, <https://cprc.org.au/wp-content/uploads/2021/12/Exploring-regulatory-approaches-to-consumer-vulnerability-A-CPRC-report-for-the-AER.pdf>, November 2019. Family violence also affects 1 in 19 men: Australian Bureau of Statistics, *Personal Safety Survey*, 2016. G660:2018.

- an inflexible approach to providing the right financial help can contribute to financial hardship.²¹

While the ACCC strongly supports the intent and content of the *Assisting Customers Experiencing Domestic and Family Violence Guideline*, we consider the fact that compliance with it is voluntary, meaning there is little incentive on telecommunications suppliers to embed improved practices, to be a significant issue.

3. Other issues

In addition to the issues affecting consumers experiencing vulnerability set out above, the ACCC has heard from a range of stakeholders that there are a significant number of issues with the current TCP Code which are likely to affect all telecommunications consumers across Australia. These include:

- the lack of requirement to assist consumers to access translated information
- issues with the current information provided in critical information summaries
- issues with sales practices and selling incentives
- barriers to consumers' ability to cancel contracts
- the lack of requirement to provide consumers with notice that their contract is expiring
- the lack of requirement to provide consumers with notices that their charges are being increased, or that their service terms are changing
- the lack of information around early termination fees
- opportunities to prevent identity fraud and scams
- the obsolete 'small business' threshold
- the lack of comprehensive compliance auditing requirements

We set out our views on each of these issues in turn.

Lack of requirement to provide consumers with assistance in accessing translated information

Telecommunications services and contracts can be complex, and this can be exacerbated by the fact that 44% of Australians have literacy levels below what is considered enough to get by in everyday life.²² The ACCC accordingly supports the current provisions in section 3 of the TCP Code, which require suppliers to communicate clearly and accurately with consumers, in plain language, and in a way that is appropriate to the consumer's communication needs.

²¹ Telecommunications Industry Ombudsman, *Meeting the needs of consumers impacted by family violence: Systemic Investigation Report*, https://www.tio.com.au/sites/default/files/2020-12/TIO%20Systemic%20Report_Meeting%20the%20needs%20of%20consumers%20impacted%20by%20family%20violence_December%202020.pdf, December 2020.

²² Consumer Policy Research Centre, *Exploring regulatory approaches to consumer vulnerability*, <https://cprc.org.au/wp-content/uploads/2021/12/Exploring-regulatory-approaches-to-consumer-vulnerability-A-CPRC-report-for-the-AER.pdf>, November 2019.

However, we note Australia's cultural diversity, including the 22.8% of Australians who speak languages other than English.²³ We highlight that there is no requirement under the Code that telecommunications suppliers assist consumers upon request, to access translated documentation or translation services. There is also no requirement that suppliers provide critical information summaries or information on hardship supports which are translated in common languages other than English spoken in Australia.

The ACCC considers these current gaps may prevent consumers' ability to effectively engage with telecommunications suppliers, and to understand the products or services they are acquiring, as well as the support available to them if they so require.

Issues with current critical information summaries

The ACCC supports a requirement that suppliers provide critical information summaries. However, we note that the current requirements relating to these summaries are outdated and do not take into account the needs of consumers who may be experiencing vulnerability. Further, the critical information summary requirements lack information on the role of the ACCC, including links to ACCC resources on consumer rights under the ACL.

We welcome discussion on improvements to the format of critical information summaries, in light of current and recent research findings on effective information disclosure. This discussion may be informed by recent behavioural insights research into information disclosure, such as that undertaken by the Behavioural Economics Team of the Australian Government on improving complex information presentation to consumers in the context of energy bills.²⁴

Issues with selling practices and sales incentives

As noted above, telecommunications services and contracts can be complex, and due to literacy or other issues, some consumers may not have the capacity to properly comprehend the contract into which they are entering.

We highlight the ACMA's finding that many consumers have only a very basic understanding of their plan at the time they took out their telecommunications contract, with many being caught off-guard by changes in terms or increases in costs following an initial discounted period.²⁵ According to the ACMA, among consumers who had made their purchase in a store, many noted that the salesperson did not explain the terms and conditions of the contract to them, but rather told them to read the document directly – a challenge due to the length, language used and complexity of the terms and conditions.²⁶

We also note research commissioned by the ACCC which 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

²³ ABS, *Cultural Diversity of Australia*, <https://www.abs.gov.au/articles/cultural-diversity-australia#language>, September 2022.

²⁴ Behavioural Economics Team of the Australian Government, *Improving Energy Bills Final Report*, <https://behaviouraleconomics.pmc.gov.au/sites/default/files/projects/final-report-improving-energy-bills.pdf>, October 2021.

²⁵ ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

²⁶ ACMA, *Financial hardship in the telco sector: Keeping the customer connected*, https://www.acma.gov.au/sites/default/files/2023-04/Financial%20hardship%20in%20the%20telco%20sector_Keeping%20the%20customer%20connected.pdf, May 2023.

sales.²⁷ 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.²⁸ 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.²⁹

The ACCC accordingly considers there to be issues around the lack in requirement that suppliers actively take account of customer circumstances and provide information about appropriate products and services, including lower cost options. We highlight the best practice approach under responsible banking requirements,³⁰ that suppliers must not suggest or enter into a contract with a consumer if that contract is not suitable for that consumer.

Barriers to consumers' ability to cancel contracts

The ACCC highlights recent international reforms designed to reduce barriers faced by consumers who wish to cancel a subscription or contract. At the heart of these reforms is the reduction or elimination of the practice of 'forced continuity.' Forced continuity refers to design features and website navigation that impede a consumer's ability to cancel or move out of a particular service. For example, a Norwegian Consumer Council investigation identified that in 2021 it took consumers three screens/clicks to subscribe to Amazon Prime, but up to 12 screens/clicks to unsubscribe from the service.³¹

Forced continuity can lead to consumers keeping products or services that they no longer want or need, which may cause them financial harm. The Consumer Policy Research Centre noted that the potential harm may be exacerbated or compounded for those consumers already experiencing circumstantial vulnerabilities, such as illness or loss of employment, or systemic vulnerabilities, such as lower digital literacy.³² The ACCC is concerned that forced continuity is becoming ubiquitous. For example, the Consumer Policy Research Centre found that 76% of consumers surveyed had experienced difficulty cancelling an online subscription.³³

In July 2022, following complaints by European consumer protection authorities, Amazon Prime reduced their cancellation process for European subscribers to just two screens/clicks.³⁴ Further, Germany has recently enacted laws requiring businesses to implement a 'cancellation button' on websites to enable consumers to easily terminate ongoing contracts. This cancellation function is mandatory, and must be legible and clearly

²⁷ Frost & Sullivan, *Research into the Door-to-Door Sales Industry in Australia, Report for the Australian Competition and Consumer Commission*, <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>, August 2012.

²⁸ Consumer Action Law Centre, *Knock it off!*, <https://consumeraction.org.au/wp-content/uploads/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>, November 2017.

²⁹ ACCAN, *Spotlight on Telco Commissions and Targets*, <https://accan.org.au/files/ACCAN%20-%20Loneragan%20Telco%20Commissions%20-%20Targets%20-%20Report.pdf>, March 2019.

³⁰ Per chapter 3 of the *National Consumer Credit Protection Act 2009*.

³¹ Consumer Policy Research Centre, *Duped by Design: Manipulative online design: Dark patterns in Australia*, <https://cprc.org.au/wp-content/uploads/2022/06/CPRC-Duped-by-Design-Final-Report-June-2022.pdf>, June 2022.

³² Consumer Policy Research Centre, *Duped by Design: Manipulative online design: Dark patterns in Australia*, <https://cprc.org.au/wp-content/uploads/2022/06/CPRC-Duped-by-Design-Final-Report-June-2022.pdf>, June 2022.

³³ Consumer Policy Research Centre, *Duped by Design: Manipulative online design: Dark patterns in Australia*, <https://cprc.org.au/wp-content/uploads/2022/06/CPRC-Duped-by-Design-Final-Report-June-2022.pdf>, June 2022.

³⁴ European Commission, *Consumer protection: Amazon Prime changes its cancellation practices to comply with EU consumer rules*, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4186, 1 July 2022.

labelled.³⁵ The Federal Trade Commission in the USA is also currently consulting on similar rules.³⁶

We note that laws requiring that businesses offer simple online cancellation processes have already been enacted in specific cases in Australia. For example, in 2018, the National Consumer Credit Code was amended to allow easier online credit card cancellation options after a Senate Inquiry found that consumers could easily sign up for a credit card but typically had to take multiple complex steps to cancel.³⁷ We consider it to be concerning that similar rights are not afforded to telecommunications consumers.

Lack of notice of impending contract expiry

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 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.³⁸

We highlight the ACCC's recommendation made during the Home Loan Price Inquiry regarding prompts which set out how consumers could look for a better offer,³⁹ and the AER's Better Bills requirement that suppliers include information within bills about the best possible offer currently available to them.⁴⁰

Lack of notice of increased service charges or changes to service terms

According to the ACMA, a telecommunications supplier may not change the terms and conditions of a contract for service unless the changes will not have a negative effect on consumers.⁴¹ As such, a supplier may not increase the price for a service during the contract period for that service.

However, consumers or small businesses may be on a month-to-month service contract, rather than a longer-term contract. Accordingly, a supplier may increase the price of their service from time to time. Further, we understand that suppliers may, on occasion, change the terms of a service offered to a consumer due to a change in the supplier's capability.

³⁵ Section 312k *German Civil Code*, enacted in July 2022.

³⁶ Federal Trade Commission, *Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to "Click to Cancel" Recurring Subscriptions and Membership*, <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>, March 2023.

³⁷ Section 133BU *National Consumer Credit Protection Act 2009*.

³⁸ Ofcom, *End-of-contract notifications driving better deals for customers*, <https://www.ofcom.org.uk/news-centre/2022/end-of-contract-notifications-driving-better-deals-for-customers>, May 2022.

³⁹ As per the ACCC's recommendations made in ACCC, *Home Loan Price Inquiry Final Report*, <https://www.accc.gov.au/system/files/Home%20loan%20price%20inquiry%20-%20final%20report.pdf>, November 2020.

⁴⁰ As per the 'better offer' requirements imposed on energy retailers in the AER, *Better Bills Guideline*, https://www.aer.gov.au/system/files/AER%20-%20Better%20Bills%20Guideline%20%28Version%20%29%20-%20January%202023_0.pdf, January 2023.

⁴¹ ACMA, *Understand your telco contract*, <https://www.acma.gov.au/understand-your-telco-contract>.

The ACCC considers the fact that the TCP Code does not stipulate any requirements for notification of increased service costs or a change in service terms to be an issue. We consider the provision of notice of these types of events is vital to allow consumers to consider their options and to switch providers if preferred.

Lack of information relating to the level of early termination fee

Early termination fees usually involve the consumer having to pay out the entire contractual period on a pro rata basis. The current TCP Code includes some rules about early termination fees, which relate to the disclosure of termination fees in communications offers and advertising. These do not include information about the level of the fee.

The ACCC considers the lack of requirement to provide information about the level of a termination fee to be a significant issue. We also have concerns around the lack of requirement to inform consumers if a termination fee is affected by the return of any service equipment that may have been acquired in the course of the service contract.

Opportunities to prevent unauthorised customer transfers

The ACCC recently supported the ACMA in making the Telecommunications Service Provider (Customer Identity Verification) Determination 2022. This determination requires telecommunications providers to use multi-factor authentication to verify a consumer's identity when they undertake transactions that are high-risk for scam activity, such as SIM-swap requests, changes to accounts, or disclosure of personal information.

Our data shows that these reforms have led to a significant reduction in mobile porting related scams. However, we are concerned by the \$3 billion in losses reported to Scamwatch, the government, and the financial sector in 2022,⁴² as well as the serious national data breach incidents which have occurred over the previous 12 months.

The ACCC would welcome discussion on opportunities to strengthen protections within the TCP Code to embed best practice and prevent scam activity and identity fraud. However, we consider this discussion must be cognisant of the accessibility issues and potential barriers that may be imposed, particularly in relation to First Nations consumers, by any changes requiring photo identification verification.

The obsolete definition of 'small business'

Small businesses have rights under the ACL to be protected from misleading and deceptive conduct and anti-competitive behaviour. Further, the ACL consumer guarantees apply to all goods and services purchased by consumers. Currently, a 'consumer' can either be a business or a person, provided the goods or service cost up to \$100,000.⁴³ However, under the TCP Code, a consumer is defined as:

a business or non-profit organisation which acquires or may acquire one or more telecommunications products which are not for resale and, at the time it enters into the customer contract, it does not have a genuine and reasonable opportunity to negotiate the terms of that contract, and has or will have an annual spend with the Supplier which is... no greater than \$40,000.

⁴² ACCC, *ACCC calls for united front as scammers steal over \$3bn from Australians*, <https://www.accc.gov.au/media-release/accc-calls-for-united-front-as-scammers-steal-over-3bn-from-australians>, 17 April 2023.

⁴³ Section 77A, Competition and Consumer Regulations 2010.

We note that the ACL small business threshold was \$40,000 at the time of the previous review of the TCP Code, and highlight that the Code is therefore now out-of-date.

Improving compliance auditing standards

Section 10 of the TCP Code sets out requirements for Code compliance and monitoring. These requirements differ depending on the size of the supplier. The requirements are less onerous for small suppliers with fewer than 3,000 services in operation, and more onerous for large suppliers with more than 100,000 services in operation.

The ACCC highlights two issues with the current Code provisions. We note that Chapter 10 requires telecommunications suppliers to report annually on their compliance with the Code, and allows suppliers to identify that they are only partially compliant with the Code and submit a compliance attestation to that effect. However, there is no limit on the number of occasions on which a telecommunications supplier can report being partially compliant. We consider repeated non-compliance relating to the same conduct or issue should be addressed in the enforcement framework.

Secondly, we note that the Code compliance provisions require only large suppliers to provide a statement of independent assessment by an external auditor to provide assurances about the supplier's compliance program. Further, this independent assessment of the compliance program is only required once. The ACCC considers 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.

Appendix A

The following is a list of ACCC enforcement actions taken against telecommunications suppliers to address consumer harm since the last TCP Code review in 2018.

- In December 2022, the ACCC commenced proceedings against Telstra for allegedly making false or misleading representations about upload speed to residential broadband customers of its cheaper brand, Belong. In October and November 2020, Telstra migrated nearly 9000 customers who were on a Belong NBN plan with a maximum download speed of 100 megabits per second (Mbps) and a maximum upload speed of 40Mbps, to a service with a maximum upload speed of 20Mbps. The ACCC alleges that Telstra failed to notify customers of the reduction in the upload speed, and did not lower their charges, even though the cost charged by NBN Co to Telstra was \$7 a month less for the new service. These proceedings are ongoing at the time of this submission.
- In November 2022, Telstra Corporation Ltd, Optus Internet Pty Limited, and TPG Internet Pty Ltd were ordered to pay penalties totalling \$33.5 million for making false or misleading representations in their promotions of some 50Mbps and 100Mbps NBN plans. The companies claimed they would test the maximum speed of customers' connections and offer customers remedies if the maximum speed was below their plan's stated speed. However, they did not do so for many customers. It is also alleged Telstra, Optus and TPG wrongly accepted payments from certain customers for NBN plans when they were not provided with the promised speed.
- In June 2021, Dodo Pty Ltd and Primus Telecommunications Pty Ltd (part of the Vocus Group) were ordered to pay \$1.5 million and \$1 million respectively, for making false or misleading claims about the NBN broadband speeds their customers could achieve during busy evening hours. Dodo and iPrimus used a fundamentally flawed testing methodology, developed by Vocus, which was not a reasonable basis for their advertising claims about certain typical evening speeds.
- In May 2021, Telstra was ordered to pay \$50 million in penalties in relation to unconscionable conduct in the sale of post-paid mobile products to Indigenous consumers. Telstra has admitted it acted unconscionably when sales staff at 5 licensed Telstra-branded stores used unfair practices to sign up 108 Indigenous consumers to multiple post-paid mobile contracts which they did not understand and could not afford. The improper sales practices caused many of the affected consumers severe personal financial hardship and great distress, including where some unpaid debts were referred to debt collectors. In addition, the ACCC accepted a court enforceable undertaking from Telstra in which Telstra undertook to provide remediation to affected consumers, improve its existing compliance program, review and expand its Indigenous telephone hotline, and enhance its digital literacy program for consumers in certain remote areas.
- In March 2021, Superfone was ordered to pay \$300,000 in penalties for making false and misleading representations and breaching laws designed to protect consumers from unsolicited telemarketing sales. Superfone contravened the ACL between June 2017 and December 2018 when cold-calling consumers and signing them up to unsolicited new contracts with Superfone. The Court also ordered Superfone to email consumers who entered into an unsolicited agreement with Superfone, and subsequently paid a termination fee on cancellation of their contract, advising them to contact Superfone for a full refund of the termination fee. Superfone was also required to email other consumers whose unsolicited agreement have expired, but who were continuing to receive services from Superfone on a month-to-month rolling basis, offering them the opportunity to exit their contract with Superfone without charge.

- In October 2020, Amaysim Australia Ltd and Lycamobile Pty Ltd paid penalties totalling \$126,000 and \$12,600 respectively after the ACCC issued each of these mobile services providers with an infringement notice for alleged false or misleading representations about their mobile phone plans. We alleged that each business separately misrepresented that its mobile phone plans were 'unlimited' in advertisements on social media designed to entice new customers, when in fact the plans had a maximum data allowance.
- In June 2020, the ACCC accepted a court enforceable undertaking from NBN Co in relation to representations NBN Co made to TransACT Network consumers that their telephone and internet services would be disconnected if they did not move over to the NBN. The ACCC considered that those representations were false as the TransACT Network will continue to operate alongside the NBN. As part of the undertaking, NBN Co agreed to reimburse the early termination costs paid by customers who moved across prior to 10 July 2019, and then chose to return to the TransACT Network and to improve transparency over networks that will continue to compete with the NBN.
- In December 2019, the Federal Court ordered Optus to pay a \$6.4 million penalty for misleading consumers regarding the need to switch to NBN or risk disconnection. Optus admitted that it had no basis for claiming the consumers were at risk of disconnection, since Optus understood that the consumers were already acquiring NBN services from another provider. This follows a similar case in 2018, where the Federal Court ordered Optus to pay penalties of \$1.5 million for making misleading representations to customers about their transition from Optus' HFC network to the NBN.
- In September 2019, BVivid Pty Ltd paid penalties totalling \$25,200 after it was issued with two infringement notices by the ACCC in relation to misleading cold calls made to consumers who were led to believe that their internet services would be disconnected or their telephone number would be lost if they did not move to the NBN immediately. BVivid also admitted that it likely breached the unsolicited consumer agreement protections in the ACL when it supplied services within the 10 business day cooling-off period and failed to give consumers an official form they could use to terminate the contract. In addition to paying the infringement notice penalties, BVivid provided a court enforceable undertaking in which it committed to contact all affected consumers and offer to release them from their contracts without charge and refund any termination fees already paid, as well as review its internal practices and compliance procedures.
- In July 2019, Vodafone Hutchison Australia provided a court enforceable undertaking to the ACCC under of the section 93AA *Australia Securities and Investments Commission Act 2001* (ASIC Act) following the ACCC investigating Vodafone's third-party billing or direct carrier billing services under a delegation from ASIC. In the undertaking, Vodafone admitted likely breaches of the ASIC Act and agreed to issue refunds to customers where appropriate.
- In July 2019, the ACCC accepted a court enforceable undertaking from Dodo Services Pty Ltd regarding claims that certain retail broadband plans supplied over the NBN were 'perfect for streaming' when that was not the case. Dodo admitted the 'perfect for streaming' statements were likely to contravene the ACL and agreed to refund up to \$360,000 across 16,000 affected customers.
- In March 2019, the Federal Court ordered Australian Private Networks Pty Ltd (trading as Activ8me) to pay penalties of \$250,000 for making false or misleading representations and not displaying a single price when advertising its internet services. The Court also ordered Activ8me offer to refund setup fees and allow affected customers to exit or switch plans without charge.

- In February 2019, the Federal Court ordered Optus to pay a \$10 million penalty for misleading consumers who unknowingly purchased games, ringtones and other digital content through its third party billing service. Optus admitted that it did not properly inform customers that the third party billing service was a default setting on their accounts, and that they would be billed directly by Optus for any content bought through the service, even unintentionally. The ACCC took this action under a delegation of power from ASIC.