

Chair and Agency Head

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Dear Mr Stanton ^{John}

Re: TCP Code review

Thank you for your letter of 14 December 2023 on proposed changes to the Telecommunications Consumer Protections Industry Code (TCP Code).

The TCP Code package is a substantial and meaningful body of work by Communications Alliance (CA) and its members to address many of the concerns across five of the areas highlighted in my letter of 5 July 2023 and detailed in the ACMA's position paper *What consumers want – consumer expectations for telecommunications safeguards* (ACMA position paper). Development of the Financial Hardship Standard is largely addressing the sixth area of concern.

I acknowledge that, as requested in my letter, CA and its members have made progress towards definitive and agreed views on changes to the TCP Code, along with providing some examples of draft revised provisions by the requested date of 15 December 2023. We note the timeframe that CA was given and that the concurrent Financial Hardship Standard process left some matters open for interpretation. The Authority has now been able to review the package in detail and these factors have been considered in the Authority's assessment of the package.

In summary, the Authority considers that good progress has been made in improving proposed consumer protections in many sections of the Code but that the effectiveness of those provisions will not be able to be fully assessed against the legislated prerequisites for registration until final drafting has been completed. We have included specific ACMA feedback for your consideration at **Attachment A**. The feedback relates to the proposed changes and drafting for responsible selling practices, credit assessments, payment methods and consumers in vulnerable circumstances in your position papers.

Matters requiring further consideration

We consider that the response falls short in the key areas set out below.

Payment methods

We are disappointed that new proposals for payment methods have ignored the fundamental concern expressed in the ACMA position paper that alternative payment methods to direct debit are not now widely offered to telecommunications customers. While some helpful flexibility has been proposed to allow customers to adjust the timing of their direct debits to better suit their circumstances, the proposed Code changes are focused on direct debit payment methods.

To provide appropriate community safeguards, the provisions will need to ensure that direct debits/auto-payments are not the only payment method offered, with at least one alternative being offered fee-free to all customers with similar flexibility.

The Authority notes that while industry has chosen to reduce the range of payment options offered to new customers in recent years, that alternative payment options are still made available by

some providers. We also note that Telstra has recently indicated that it intends to re-introduce a range of payment methods to its new and existing customers.

Responsible selling practices

While there are some proposed changes to prevent mis-selling by addressing the conduct of sales staff, there appears to be more emphasis on the provision of essential information to customers prior to accepting a sale. In the ACMA's compliance and enforcement experience, the conduct of sales staff is a significant cause of mis-selling.

The ACMA would like to see an overarching clear and positive obligation on CSPs to deliver fair and reasonable outcomes that are suited to each consumer's individual circumstances. In particular, the proposal to introduce a requirement for selling policies for staff (incentive schemes) should be further developed to ensure that they provide incentives for responsible selling and rewards are based on the sale of products that are suitable to customers' needs.

Use of guidance notes and guidelines

More generally, there appears to be an expanded use of guidance notes or references to guidelines, some of which may be in development. Guidance to help understand the TCP Code obviously has a place, but these are not enforceable provisions. Guidance notes are beneficial when they are supplementary to enforceable provisions and not replacements for such, and where they do not serve to create further complexity.

The excessive use of guidance notes and guidelines in place of enforceable code provisions would not be acceptable to the Authority in a final Code draft. Consideration should be given to how Guidance notes and references can be incorporated as enforceable obligations where possible.

Outcomes-based regulation

The draft provisions appear to indicate that industry wishes to shift to a more outcomes-based approach in a new TCP Code. We have previously advised CA that, while open to outcomes-based regulation as a concept, the Authority cannot accept provisions that are so high-level as to be meaningless to stakeholders and unenforceable. We have also previously advised that outcomes based regulations need to be supported by robust and comprehensive record-keeping by providers to allow the ACMA to investigate potential non-compliance.

We consider that how providers would demonstrate compliance through measures of success and other means is largely absent from the current package. We expect the final Code to contain clear record-keeping requirements to support internal business processes and oversight, and regulatory assessment of compliance. We further expect that such record keeping requirements will strike an appropriate balance between maintaining a clear evidence base and not unduly risking the privacy of any customer's personal information in the event of unintended disclosure.

I note that CA is intending to retain the current attestation process as part of the Measures of Success Code structure. However, little change has been proposed to the current attestation process. The TCP Code review offers the opportunity to tighten and improve the rigour of this process to ensure that where a CSP attests that its systems and practices do not support full compliance, that CommCom promptly works with the CSP to ensure that remedial action occurs quickly.

Clarity and certainty in drafting

The ACMA position paper identified a range of principles relevant to the consumer expectations discussed, including the principle of accountability.

Accountability reflects an organisation's responsibilities to its stakeholders. In the ACMA's view, it is also a critical underpinning to consumers having confidence in the co-regulatory system.

We have, over multiple years, raised concerns with industry that some obligations within the TCP Code are vague and, in certain cases, subjective. The use of words such as 'may' (rather than 'must') and 'appropriately' do not provide clarity to industry or certainty to consumers about what

they can expect of their providers. They also make compliance assessment difficult for the regulator.

We expect the final draft Code to contain clear and definitive rules to assist industry understand its obligations and to be assessable so that appropriate compliance action can be undertaken where necessary.

Next steps

While there is still material work ahead, the Authority is largely comfortable with CA continuing its Code development process as long as the ACMA feedback provided is addressed.

Regarding the review process, the Authority received a submission on 15 January 2024 from Michael Cosgrave, the TCP Code review Independent Advisor, setting out his initial assessment of how CA and its members have conducted the TCP Code review process to date. We note that the submission has been published by CA and may be referenced in its application for registration of the TCP Code in due course.

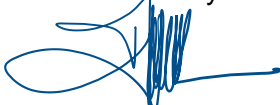
The Authority's decision about whether to register a new TCP Code will entail assessing the extent to which the revised Code sets out effective, measurable and enforceable obligations that provide appropriate consumer safeguards, as well as being satisfied of the other relevant matters set out under section 117 of the *Telecommunications Act 1997*. Addressing the matters raised in this letter will be crucial to this assessment; conversely, should the ACMA's concerns not be adequately addressed, it remains open for us to pursue direct regulation in any area of remaining concern.

Due to the Authority's strong concerns regarding industry's position on payment methods, I request that CA reconsiders its views and provide an update on industry's agreed position and proposed drafting by **14 March 2024**. As noted more generally above, in the absence of payment method Code revision proposals and drafting that address the Authority's stated concerns, the Authority is likely to be of the view that co-regulatory arrangements concerning payment methods are deficient and we would commence necessary processes to introduce an Industry Standard.

I request that you come back to the Authority with drafting that addresses the remaining matters of concern by **3 May 2024**.

The ACMA contact for this matter is Jeremy Fenton, Acting General Manager, Consumer Division on (03) 9963 6909 or at jeremy.fenton@acma.gov.au. The Authority is also available should you wish to discuss the matters raised in this letter.

Yours sincerely



Nerida O'Loughlin PSM
| February 2024

Encl: Attachment A

ATTACHMENT A

Table 1: Specific ACMA feedback on proposed TCP Code changes

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
Responsible Selling Policies	General comment about the Response selling Policies position paper drafting		The TCP Code should include a positive obligation on CSPs to deliver fair and reasonable outcomes for consumers that are suited to each consumer’s individual circumstances. This includes providing information on lower cost options.
	<p>Proposal – Provision of information at point of sale</p> <p>Proposal – updated/clearer information-provision requirements</p> <p>Chapter 5 - Responsible selling: Advertising and pre-sales information: The CIS, [update current cl 4.2.2(a)]</p> <p>Chapter 5 - Responsible selling: Advertising and pre-sales information: Advertising offers, [update current cl 4.1.3]</p> <p>Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Point of Sale, [update current cl 4.5.1(b)]</p> <p>Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Order summary, [new clause]</p>	091-092	<p>We cannot assess the adequacy of the consumer protections until drafting is provided – particularly in context in the Code.</p> <p>The extent of improvement to current provisions will depend on the robustness of drafting.</p>
	<p>Proposal – contract records</p> <p>Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Customer contract, [update cl 4.6.5]</p>	092	CA states the purpose of the drafting is to update record keeping requirements in the Code to include the concept ‘essential information’. We agree in principle with the proposal. However, the concept ‘essential information’ should be strengthened in the drafting.

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
	<p><u>Proposal – Remedies for mis-selling</u> Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Selling Policies, [new clause]</p>	092-093	<p>Provision 2(b) should be revised to require CSPs to provide the customer with a remedy tailored and appropriate to the harm experienced by the customer and is the customer’s preferred remedy, rather than this being in the guidance note.</p> <p>Timeframes for the provision of the remedy should also be included, as should appropriate record keeping requirements.</p>
	<p><u>Proposal – Monitoring complaints about sales conduct</u> Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Selling Policies, [new clause]</p>	093	<p>There needs to be a requirement to implement the policy in addition to having a policy.</p>
	<p><u>Proposal - Selling policies for sales staff</u> Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Responsible incentive structures [new]</p>	093-094	<p>We agree in general with the proposal but consider drafting needs to be refined to better address the harm. Incentive structures should reward the sale of products that meet the consumer’s needs. Mechanisms such as claw backs, while a useful tool, are not considered to be adequate on their own.</p> <p>One way of achieving the above goal would be to move the customer satisfaction-based incentives approach from the guidance note and into part of the main provision. For example: ‘A CSP’s incentives structures must be based on customer satisfaction and not volume of sales.’</p>
	<p><u>Proposal – Sales to vulnerable customers</u> Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Selling Policies, [new clause]</p>	094	<p>We agree with the underlying intent of this protection but are concerned that at-risk consumers will not be able to take advantage of this apparent protection, limiting its effectiveness.</p> <p>Where the nature of a vulnerability is episodic or medical it will not necessarily be possible to acquire retrospective proof. Consumers may also find it humiliating to have to obtain proof of vulnerability at the time of a previous sale.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
			Drafting should address the need for strict record keeping requirements about the collection and retention of any such personal information.
Essential information during the sales process	<p>Proposal - essential information definition Define the term 'essential information' in relation to a telecommunications product during the sales process. Sample drafting Chapter 1 - Terminology, definitions, and acronyms: Definition of 'essential information' [new] Guidance - Guidance box to be developed with examples</p>	069	<p>The ACMA will need to see drafting of the Guidance, including examples, in order to assess the benefit afforded.</p> <p>While we agree in principle with the proposal, it is not possible to assess the adequacy of the consumer protections until drafting is provided in the revised TCP Code as a whole.</p>
	<p>Proposal - inclusion of term in critical stages of the sales process - 'essential information' is required to be provided Chapter 5 - Responsible selling: Advertising and pre-sales information: The CIS, [update cl 4.2.2(a)] Chapter 5 - Responsible selling: Advertising and pre-sales information: Advertising offers, [update cl 4.1.3] Chapter 6 - Responsible selling: Sales, contracts and credit assessments: Point of Sale, [update cl 4.5.1(b)]</p>	070	<p>We agree in principle with the proposal, however we cannot assess the adequacy of the consumer protections until drafting is provided in the revised TCP Code as a whole.</p>
Mobile Network Coverage	<p>Desired outcome from TCP Code revision</p> <ul style="list-style-type: none"> Provide consumers with consistent information about potential mobile network performance and ensure information about coverage is readily available. 	074	<p>The first bullet point should be 'consistent <i>and reliable</i>' information'. Reliability is also important to consumers when making a decision.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
	<ul style="list-style-type: none"> CSPs have remedies available where mobile network coverage proves not to be as indicated or reasonably expected. 		
	<p>Proposal - Sales process should include information about expected mobile coverage</p> <p>Proposal - Remedies in relation to mobile network coverage</p>	078-79	Agree in principle with the proposals but cannot assess the adequacy of the proposed protections until drafting is provided.
Credit assessments	<p>Proposal - refresh credit assessment clauses</p> <p>A refreshed credit assessment requirement, designed to address the risk of financial harm through financial overcommitment, credit management and defaults.</p> <p>Additionally, there will be a collection of updates to the Code to address the underlying causes of harm connected with responsible selling</p>	048	Insufficient detail has been provided to assess the adequacy of consumer protections.
	<p>Proposal - outcome of failed credit assessment</p> <p>Chapter 6 - Responsible selling: Sales, contracts and credit assessments; Declined credit assessment, [update cl 6.1.2]</p>	051	<p>We note the proposed drafting of cl 6.1.2(1)(a) is still similar to the existing provision – ‘advise the Consumer of that outcome’.</p> <p>We have concerns that the proposed revised drafting of cl 6.1.2(1)(b) may encourage CSPs to develop a default list of telecommunications products rather than the customer being offered the best range of alternative products to suit their needs and afforded appropriate choice.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
Payment methods	<p>Proposal – new requirements designed to require that payment method options are clearly disclosed</p> <p>Chapter 5- Responsible selling: Advertising and pre-sales information: The CIS [new clause]</p>	084	<p>CA has proposed CSPs will also be required to provide information about any fees associated with a particular payment method; with this information to be made available via a link from the CIS.</p> <p>We consider the CIS should specify which payment options are free-of-charge and the costs associated with any payment options – rather than the consumer being required to click on a link from the CIS. This is a more transparent approach, facilitates consumer awareness of fees associated with payment methods and reduces the risk of information asymmetry.</p>
	<p>Proposal – new requirements to require flexibility around payment methods</p> <p>Chapter 8 - Billing and payments: Flexible payments (new clause)</p>	084-085	<p>Under the proposed drafting ‘Direct Debit’ is the default option and other payment methods are only offered where flexibility around Direct Debit cannot be offered by the CSP.</p> <p>The ACMA is of the view that all customers should have a choice of options to pay for their telecommunications services, not only direct debit, and ideally with at least one fee-free alternative that is not direct debit. This view is reinforced in the accompanying letter.</p>
	<p>Proposal – update and simplify requirements relating to all direct debit payments in cl 5.7.1</p> <p>Proposal – new/extended requirements around notifications to remind consumers of impending direct debits</p> <p>Chapter 8 – Billing and payments: Direct debit payments (updated and extended cl. 5.7.1)</p>	085-086	<p>The new cl 5.7.1(1)(d) should include a specified time rather than the current drafting of ‘sufficient time’.</p> <p>We note cl 5.7.1(e) of the current Code requires CSPs to provide the customer or former customer with a simple mechanism by which they can cancel a Direct Debit authorisation. This provision appears to be missing from the proposed drafting for the revised Code.</p> <p>The new draft cl 5.7.1 omits the following protection at 5.7.1(c) in the existing code. That existing protection</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
			<p>gives post-paid direct debit customers whose bills are not for set monthly amounts at least 10 days to check their bill charges prior to being direct debited: <i>c) except where clause 5.2.1 b) applies or where otherwise agreed between the Supplier and the Customer, must allow the Customer, or former Customer, not less than 10 Working Days to check the Bill, or if no Bill is required all applicable Charges, before the associated Direct Debit transaction occurs;</i></p> <p>We cannot properly assess the adequacy of the consumer protections here until all drafting of these proposals is provided.</p>
	<p>Proposal – new requirement relating to failed Direct Debits Chapter 8 – Billing and payments: Failed direct debit payments (new clause)</p>	086	<p>We consider ‘3-4 working days’ (draft clause 1(b)) is not an adequate timeframe and should be 7 working days in consideration of timeframes associated with rearranging finances, pay cycles, asking for and obtaining financial help. Seven working days is also consistent with s.17 of the FH Standard.</p>
	<p>Proposal – remedies for direct debit errors Remedies in relation to payments would remain (5.7.1(g)), but with clearer guidance about ‘appropriate action’. Chapter 8 – Billing and payments: Remedies for direct debit errors (updated 5.7.1(g))</p>	086-087	<p>The proposal does not include appropriate remedies if CSPs adopt the approach in the proposed Guidance box.</p> <p>‘Alternatives’ to a refund must not be presented in such a way that it confuses customers about their rights to a refund. Accordingly, we consider the following text be moved from the guidance note into a provision – e.g. create provision (2):</p> <p>2. Alternatives must only be presented as alternatives to a refund and not as remedies.</p> <p>We note ‘extra data’ is not relevant to most customers as the majority of plans have ‘unlimited data’.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
Vulnerable customers			<p><u>General comments:</u> 'Vulnerable consumers' is not the preferred term and is considered by some to be objectionable/offensive. The preferred terminology is 'consumers experiencing vulnerable circumstances' in recognition that anyone at any time can find themselves in vulnerable circumstances and require assistance. We agree in principle with the proposal and consider it important that CSPs focus on ensuring that consumers have the best possible information, which outlines the options available to them, including the lowest cost options as appropriate to their circumstances.</p> <p>At this point we cannot assess the adequacy of the consumer protections until drafting is provided in the revised TCP Code as a whole.</p>
	<p>Proposal – enhanced prominence and focus on meeting the needs of consumers in vulnerable circumstances, including through a new 'supporting the consumer' (or similar title) chapter.</p> <p>Proposal – new/enhanced obligations in relation to CSPs' organisational culture and policies. Chapter 3 – Organisational Culture and Governance: Policies and supporting materials [new]</p> <p>Proposal - new/enhanced obligations in relation to CSPs' training arrangements. Chapter 3 – Organisational Culture and Governance: Staff training – company- wide [new]</p> <p>Chapter 3 – Organisational Culture and Governance: Staff training – specialist staff [new]</p>	098-100	<p>We support the proposal to enhance prominence and focus on meeting the needs of consumers in vulnerable circumstances throughout the Code and in particular through an early code chapter on 'supporting the consumer.'</p> <p>Very little drafting has been provided. We note a lot of drafting in this position paper is DFV focused and that while a very important area for consumer protection focus, victim survivors of DFV are a subset of the vulnerable consumer cohort.</p> <p>Low-income customers are not among the kinds of customers who could be considered as being in vulnerable circumstances. We suggest that this cohort be included in vulnerable customer provisions as well.</p> <p>It is critical that the definition of consumers experiencing vulnerability be codified and not just included as guidance.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
	<p>Chapter 4 - Supporting the Consumer: DFV-support training requirements [new]</p> <p>Proposal - new/enhanced obligations in relation to CSPs' governance arrangements. A requirement to demonstrate executive or senior management oversight of the development, implementation and appropriate review of policies, procedures and code compliance arrangements.</p> <p>Chapter 3 – Organisational Culture and Governance: Governance [updated and strengthened 3.3.1]</p>		<p>While the proposals to enhance CSPs' organisational and cultural policies are welcome, we note the narrow scope in the sample drafting.</p> <p>We have concerns with proposed obligations that CSPs are to have regard to unenforceable guidelines.</p>
Supporting consumers affected by domestic and family violence	<p>Proposal - DFV-support policy and governance requirements</p> <p>Introduce a requirement for policies and supporting materials to manage and respond to DFV.</p> <p>Introduce a requirement to have governance arrangements to monitor compliance, including oversight by a senior executive. Require that the CSP's policy has regard to the best-practice guidelines developed by CA on this issue.</p> <p>Chapter 4 - Supporting the Consumer: DFV-support policy and governance requirements [new]</p>	061-062	<p><u>Overarching comments on the position paper</u></p> <p>Protections for consumers affected by DFV must be enforceable.</p> <p>We note that issues with the current TCP Code have been repeated where proposed drafting employs ambiguous phrases such as 'must have regard to'.</p> <p>We agree in principle with the proposals here but cannot assess the adequacy of the consumer protections until drafting is provided in the revised TCP Code as a whole.</p>
	<p>Proposal - protection from disconnection</p> <p>Introduce a requirement to protect consumers affected by DFV from being disconnected.</p> <p>Chapter 9 - Credit management, debt management and disconnection: Protecting DFV-affected consumers from disconnection [new]</p>		<p>While the guidance note provides clarity for CSPs, consumer protections could be strengthened by uplifting material into code provisions.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
	<p>Proposal - staff training Chapter 3 – Organisational Culture and Governance: Staff training – company- wide [new] Chapter 3 – Organisational Culture and Governance: Staff training – specialist staff [new] Chapter 4 - Supporting the Consumer: DFV-support training requirements [new]</p>	062-064	<p>While the proposed DFV-support training requirements appear well-intentioned, we note enforcement issues where drafting requires CSPs to ‘have regard to’ the unenforceable Industry Guideline G660: Assisting Consumers Affected by Domestic and Family Violence.</p> <p>The guidance note to Ch 4 DFV-support training requirements refers to a list of DFV training providers in Appendix 3 (as does the Stakeholder feedback comment log – p.199). However, Appendix 3 has not been provided.</p>
	<p>Proposal - access to support and evidence Chapter 7 - Customer service and support: Access to support and evidence – DFV-affected consumers [new]</p>	065	<p>We agree with the proposal to limit the amount of information CSPs request from DFV-affected consumers and retain to the minimum required to meet legal or regulatory obligations. The provision would be strengthened by a limitation of time for which the minimum amount of information is retained by CSPs.</p>
Accessibility	<p>Proposal – increase prominence and understanding of accessibility requirements in the Code through new headings and linked guidance. <i>Sample drafting</i> Chapter 4: Supporting the Customer - effective communication [updated 3.2.2, 3.4.2, 4.5.2].</p>	026-027	<p>We will need to see the final draft provisions in order to assess the adequacy of consumer protections afforded. For example, in requirement #3(a). The drafting uses the word ‘appropriately’ – this is subjective and could present difficulties when considering enforcement action in cases of consumer detriment.</p> <p>Suggest moving the material in the Guidance box about what constitutes plain English into Code clauses.</p> <p>We consider obligations would be clearer and easier for CSPs, especially smaller CSPs, to implement if one particular guide was identified. Guides for those with a disability / deaf / seniors / vulnerable consumers are self-explanatory.</p> <p>Suggest a guide for those who are vision impaired is missing – noting reference to a guide for the deaf community is included.</p>

CA Position paper area	Proposal/Drafting provision	Page of CA Compendium	ACMA feedback
	<p>Proposal – CA to draft a guideline on accessibility.</p> <p>This would provide more detail on expectations, including in relation to inclusive design, and links to relevant references.</p> <p>CA proposes to develop the guideline after Code registration, to allow it to appropriately reference expected new guidance on the DDA.</p>	029	<p>A guide on inclusive design would be appropriate. Staff need to see the detailed drafting in order to assess the benefit of the proposed accessibility guideline and any interaction with TCP Code provisions.</p>
Code structures, measures of success and reporting	<u>Further Detail - Attestation</u>	024	<p>We consider that the current Attestation process can be improved to address inherent weaknesses in it. Currently, the Attestation process provides significant scope for CSPs to have systems and processes in place to support partial compliance for an ongoing undetermined time, provided they have provided the appropriate Chapter 10 documentation.</p> <p>The Code compliance provisions require large suppliers to provide a statement of independent assessment by an external qualified assessor to provide assurances about the supplier’s compliance program. This assessment of the compliance program is only required once.</p> <p>A best practice compliance approach would include periodic assessment, at least every 2 years, by an external qualified assessor.</p>