

13 August 2018

By email: info@commsalliance.com.au

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Dear Ms Curtis

Draft Industry Code: Telecommunications Consumer Protections Code

WEstjustice and Consumer Action Law Centre (**Consumer Action**) welcome the opportunity to comment on the Telecommunications Consumer Protections Code Draft (DR C628:2018) (**draft Code**), which has been produced following the review of the existing Telecommunications Consumer Protections Code (**TCP Code**).

We have had the opportunity to read the submission by the Australian Communications Consumer Action Network (**ACCAN**),¹ and strongly endorse its comments and recommendations. While the draft Code includes many improvements, further amendments are necessary. We agree with ACCAN's outstanding concerns in relation to:²

- Selling practices
- Credit assessment
- Financial hardship
- Billing
- Customer service
- Customer access to records
- Accessibility

If the final revised TCP Code fails to adopt effective consumer safeguards in these areas, the case for direct regulation of the telecommunications sector will be irrefutable.

Consumer protections in the telecommunications market are failing Australians. It is beyond the scope of this submission to detail all of the current consumer concerns with the telecommunications industry and the TCP Code. It is disappointing that, due to the process adopted by Communications Alliance, the review of the TCP Code has not had the benefit of early and transparent public consultation to identify the key issues of consumer concern.

We commend the efforts of ACCAN and Legal Aid NSW in advocating for the inclusion of better consumer protections in the TCP Code, and are disappointed at their long list of outstanding concerns. Unfortunately, consumer advocates have been outnumbered in the TCP Code Review Working Committee, which is heavily dominated by industry representatives. To address this imbalance, we

¹ ACCAN, *Telecommunications Consumer Protections Code: Submission by the Australian Communications Consumer Action Network to Communications Alliance* (10 August 2018).

² ACCAN, *Hot Issues – TCP Code Review: Consumers must come first* (9 July 2018) available at: <https://accan.org.au/hot-issues/1518-tcp-code-review-consumers-must-come-first>.

hope that significant consideration will be given to the submissions of consumer representative organisations in this consultation.

One of the many areas of concern for our community lawyers and financial counsellors is the irresponsible provision of telecommunication services, where target and commission-based selling puts profit before good consumer outcomes. Retail providers are setting people up to fail by handing out multiple, expensive post-paid contracts upon request in a single visit to a store without a realistic (or any) assessment of a person's capacity to pay. When this leads to financial hardship, unmanageable debts and impaired credit reports that exclude people from mainstream finance and rental accommodation, there is little accountability from the provider and no redress for the customer. Poverty and family violence are cursorily recognised in hardship applications, and complaint processes are time consuming and often ineffective.

The TCP Code must be amended to introduce a robust mechanism, based on the *National Consumer Credit Protection Act 2009* (Cth), to assess the affordability of post-paid contracts, including whether the product meets the customer's needs and whether it can be afforded without substantial hardship. These basic requirements already apply to credit cards and payday loans of \$2000 – less than the total liability on many post-paid phone contracts. It's time to end the special treatment for telecommunication providers.

We also note the abysmal findings of the Financial and Consumer Rights Council's (FCRC) 'Rank the Telco' Report and endorse its recommendations.³

A list of our recommendations, as well as the ACCAN recommendations we have endorsed, is available at **Appendix A**.

In addition to endorsing ACCAN's comments and recommendations, we provide commentary and recommendations on the following topics:

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³ FCRC, *Rank the Telco* (April 2017): <https://accan.org.au/files/Grants/Rank%20the%20Telco%20Report.pdf>

1. About WEstjustice and Consumer Action Law Centre

About WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach across the West. We provide a range of legal services including legal information, advice and casework, duty lawyer services, community legal education, community projects, law reform and advocacy.

WEstjustice has a hybrid specialist–generalist model. Whilst delivering a generalist legal service, we also have six core specialist areas: consumer, employment, tenancy, family violence, fines and crime. We have a particular focus on working with newly arrived migrants and refugees, and a large portion of our clients speak a language other than English. We continue to work to highlight the needs of this group in the areas of consumer, energy and telecommunications markets.

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws and policy, and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

2. Telecommunications are an essential utility service

People are more dependent on their telecommunications services than ever, including fixed-line, mobile and broadband services. At the same time, telecommunications are subject to rapid technological change, and evolving consumer needs in ways that are different from other utilities. In that context, it is not surprising that the current framework, which relies on self-regulation, has become outpaced by rapid change in technology and the marketplace since it was enacted in 1997.

Access to telecommunications services has become necessary for financial and social inclusion in Australia. Basic social and other services are now routinely delivered and administered online, and as a result the availability of those services is severely restricted if a person is unable to access the internet. We note the following areas in which our clients rely on consistent telecommunications services:

- seeking employment and engaging in a job application process;
- reporting income and job search to Centrelink (failure of which can result in cancellation of payment);
- receiving and paying bills;
- communicating with social workers;
- arranging medical and legal appointments; and
- using telephone interpreter services.

For the most vulnerable in our community, telecommunications services are also necessary for basic safety and wellbeing. In circumstances of prolonged family violence, telephones are a lifeline to emotional and material support, as well as to services like taxis or rideshare which may be urgently required. Persons with severe physical or psychological disability often rely totally on telephone and internet communication to maintain social participation, and to access healthcare services.

The attitude of providers towards consumers has remained that of a provider of a luxury or non-essential product. Target and commission-based selling creates perverse incentives and puts profit before good customer outcomes. When people are impacted by inappropriate sales practices – leading to unmanageable bills for complicated bundled services they never wanted, disconnection, debt and impaired credit reports – there is little accountability from the provider and no redress for the consumer. Poverty and family violence are cursorily recognised in hardship applications, and complaint processes are time consuming and often ineffective.

Large increases in complaints to the Telecommunications Industry Ombudsman (**TIO**) reveal the extent of community dissatisfaction in the provision of essential telecommunications services. In its 2016/17 Annual Report, the TIO reported a 41 per cent increase in complaints.

In this context, it is essential that the TCP Code provide fit-for-purpose consumer protections.

3. Irresponsible provision of services

Inappropriate selling practices and inadequate credit assessments cause significant confusion, hardship and detriment for our clients. We strongly endorse ACCAN's concerns about the sales practices and credit assessment provisions in the draft Code.⁴

Our caseworkers, and the financial counsellors and community workers they assist, frequently report concerns about the grossly irresponsible way that major retail providers hand out multiple post-paid contracts and hardware upon request, with scant regard to whether the proposed product or service will meet the customer's needs or cause financial hardship. Frontline sales staff, motivated by sales incentives and with little support to assess capacity to repay, upsell products and add-on services that customer never requested and cannot afford. Suitable products available at affordable prices are rarely promoted.

a) Unsolicited Sales

Unsolicited telesales of inappropriate products are an enduring cause of confusion, distress, and hardship, particularly amongst our most vulnerable clients. Unsolicited sales scenarios place the consumer at a disadvantage, and very often result in poor outcomes. There is no way for a telesales representative to know where a person is at the time of an outbound sales call, or to assess whether that person's immediate circumstances indicate an impaired ability to make an informed decision about purchasing a product (see case study 1 below).

CASE STUDY 1: MARGARET'S STORY

Margaret* (name changed) engaged a large service provider for a low to mid-range post-paid service. Margaret's income was low, but she was able to afford the plan.

Margaret has serious and ongoing mental health problems. In about 2017 she was hospitalised in relation to her mental health. Margaret was placed in a secured psychiatric ward. She was not permitted to leave the ward and was heavily medicated with psychiatric drugs. While an inpatient in the secured ward, Margaret was cold-called by her provider and apparently offered an upgrade on her mobile phone plan. Margaret has only a vague memory of this phone call: she remembered being called by her provider, but could not recall the reason why, or the content of the conversation. Her provider asserted billing authority from an upgraded plan from this date.

Some time after she was released from hospital, Margaret contacted her provider to find out why she was being sent large bills. When Margaret's provider told her that she had agreed to upgrade her

⁴ ACCAN, above n 2.

plan, Margaret explained to her provider that she had been in a secured psychiatric ward at the time of the telesale, that she had very little memory of her time in that ward as she had been very heavily dosed on psychiatric drugs, that she had no recollection of the telesale and no capacity to pay. Margaret asked if the plan could be cancelled and her provider refused.

In a state of distress, Margaret approached WEstjustice for assistance.

Margaret's case has since been resolved.

Source: WEstjustice

In recognition of the compromised position of consumers who are contacted by unsolicited sales agents, the Australian Consumer Law (informed by behavioural economic theory) provides prescriptive rules for unsolicited consumer agreements including: prohibited contact hours, a requirement to cease negotiation upon request, and a requirement to provide and advise of a 'cooling-off' period.⁵ While these rules provide some procedural protection to consumers, they do not specifically address the appropriateness of products sold, or the steps required to assess appropriateness.

Unsolicited sales are inherently at odds with rational choice theory, as they involve the trader making an unrequested approach to a consumer who is not necessarily looking to buy the good— and is therefore not taking steps to inform themselves of their options in the market. Unsolicited sales staff are often highly trained and motivated by commission-based payment structures. Sales staff are not concerned that the good or service should be appropriate or affordable for the consumer, but simply that the sale be closed. Often, the salesperson involved is not directly employed by the company selling the good or service, but is instead employed by a direct selling company—and this creates a further disconnect between the consumer and the good or service on offer. Such salespeople have no incentive to conduct themselves fairly, because any 'comeback' will sheet home to the company selling the good or service, not the salesperson themselves. Reputational damage is therefore no deterrent—all that matters is the sale.

Given that default of bills can result in disconnection of an essential service, as well as a mark on a person's credit record, we submit that greater protections are required within the telecommunications industry.

RECOMMENDATION 1: Unsolicited sale of telecommunications products and services should be prohibited by TCP Code.

Short of a wholesale ban on unsolicited sales, the following recommended provisions offer appropriate protection to consumers:

RECOMMENDATION 2: The TCP Code be amended, to incorporate a new clause under the heading 'unsolicited sales' that provides:

'In respect of unsolicited telesales -

1. In order for a contract to commence, a consumer must *opt in* at the conclusion of the cooling off period provided by the Australian Consumer Law.
2. Providers must publish guidance on the minimum requirements for informed consent to unsolicited transactions.
3. Providers must retain a recording of the complete telemarketing call (including the 'pre-sale' part) to demonstrate that informed consent in an unsolicited transaction is present. The recording must be retained for a minimum of six years.'

⁵ *Competition and Consumer Act 2010* (Cth), ss 69 – 88 of Schedule 2.

If neither Recommendation 1, nor Recommendation 2, is adopted, we consider our recommendations to selling practices (Recommendation 3) in combination with our recommendation in respect of credit assessment (Recommendation 4) are required to provide consumers with adequate protection from inappropriate sales.

b) Selling practices

We strongly endorse ACCAN's comments and recommendations on selling practices.

RECOMMENDATION 3: Industry adopt a more ethical and consumer-oriented approach to sales practices. This requires aligning sales incentives with positive customer outcomes, and puts a greater onus on retailers to enquire about a customer's needs and circumstances, to ensure that are selling appropriate products to customers. Specifically, that:

- a) The following wording be added to paragraph 4.6.1: 'Sales incentives should promote responsible and ethical selling, that actively takes account of the consumer's requirements. Targets and incentives for staff must be aligned with long-term consumer outcomes, rather than short-term sales.'
- b) The following wording be added to paragraph 4.6.2: 'The supplier actively must actively take account of customer circumstances and provide customers with appropriate products and services, including lower/all cost options'.
- c) The following paragraph should be added to Chapter 3: '3.3.6: Suppliers must ensure that customer service staff receive training to deal with disadvantaged and vulnerable customers, and are able to deal with disadvantaged and vulnerable customers appropriately.'
- d) A post-sales support paragraph be added as follows: 'Customer service staff must contact new customers after three billing cycles to see if the customer needs further assistance in understanding their obligations.'

c) Credit assessment (CI 6.2.1(a))

The failure to require a meaningful credit assessment in the draft Code has very real impacts on people on lower or fixed incomes. Now that access to a mobile phone and the internet is an essential service necessary for full participation in society, most people will prioritise paying the phone bill over other essentials. Large bills quickly lead to large debts and termination of service, with further costs added, and a default listing on the customer's credit reports. A default listing will significantly impair a person's ability to obtain credit (or obtain credit at a fair price) for five years, and can even affect a person's ability to obtain rental accommodation.

We are particularly concerned about the impact on young people and newly arrived communities, for whom a post-paid phone contract may be their first credit contract. If this is unaffordable, it can be the first step in leading to their exclusion from mainstream finance.

CASE STUDY 2: SAHRA'S STORY

Sahra (name changed) is a young woman from a refugee background, supporting her three children on a single parenting pension. At the end of 2015, Sahra approached a telco to sign up for a phone, but ended up being upsold a second product, which she could not afford. She attended the store with her children. When the sales representative asked if she worked, she said no. She told them that she lives in government housing.

After signing up, the inevitable happened: she fell into debt. A bill for \$400 arrived one month. Soon after she was hit with a bill for over \$4000.

Even getting a statement of Sahra's account that showed payments made and amounts owing was a difficult task, taking our legal team months. Once we obtained these records, which showed that Sahra was in arrears on her first phone when she was signed up to her second contract, the telco categorically refused to accept that their conduct was in breach of the TCP Code and demanded full payment of the contract price for both devices – over \$4,000. Termination charges make up the bulk of the cost, as the client defaulted quite early in her contracts.

The telco made a default listing on her credit report, which will adversely impact her ability to obtain credit for 5 years from the date of listing.

Source: Consumer Action

It is a perverse outcome that providers can reduce a person's creditworthiness without having to undertake any realistic assessment of their creditworthiness in the first place.

We support the requirement in the draft Code that, for an existing customer who seeks to purchase additional device(s), sign up to multiple post-paid services, or change to a plan with an increased cost, the Supplier check the customer's payment history with the supplier (Clause 6.2.1(a)(i)). However, there is no detail on what the supplier must do if the customer is, or has been, in arrears. Nor does the draft Code specify the consequences for the supplier and remedies for the customer if this requirement is breached.

These gaps go to the heart of our concerns about credit assessments: the absence of a realistic assessment of affordability, and a lack of effective remedies for consumers who suffer the detriment from the irresponsible provision of post-paid services.

The draft Code retains the existing definition of 'credit assessment' to mean 'the process by which a Supplier determines the level of credit to be provided by it (if any) to a Consumer.' This definition is so vague as to render the protection meaningless – a provider can simply determine the process for themselves.

The addition of the Guidance Box at Clause 6.2.1 does little to remedy this problem. As ACCAN points out, 'this box has no standing as it is not enforceable and many of the options are irrelevant to a consumer's capacity to pay,' and leaves too much to the discretion of the sales representative.⁶

Rather than leave the credit assessment entirely up to the provider, we need a robust credit assessment process based on the requirements in the *National Consumer Credit Protection Act 2009* (Cth).

RECOMMENDATION 4: Industry adopt a robust process to assess the suitability and affordability of post-paid services, based on the requirements for consumer credit providers in the *National Consumer Credit Protection Act 2009* (Cth). The TCP Code should require that:

⁶ ACCAN, above n 2.

- a) Suppliers conduct an assessment that a post-paid service is 'not unsuitable' for the consumer.
- b) A post-paid service must be assessed as unsuitable where, at the time of the assessment, it is likely that:
 - i) The service does not meet the consumer's requirements and objectives; or
 - ii) The consumer will be unable to meet their payment obligations, either at all or only with substantial hardship.
- c) In undertaking the assessment, the Supplier must:
 - i) Make reasonable inquiries about both the consumer's requirements and objectives and their financial situation; and
 - ii) Take reasonable steps to verify the consumer's financial situation.
- d) Suppliers must not supply a service that is assessed as unsuitable.

ALTERNATIVELY, the TCP Code should require, at a bare minimum, that:

- a) In conducting a credit assessment, Suppliers must obtain and assess:
 - i) Proof of income (bank statements, payslip or Centrelink statement); and
 - ii) Proof of housing costs (rent receipt, copy of lease, mortgage repayments).
- b) Suppliers must not supply a proposed post-paid service where the credit assessment shows that the customer could not afford payment obligations at all or only without substantial hardship.

Where the proposed service is assessed as unaffordable for the customer, the supplier should assist the customer to identify affordable alternatives, such as cheaper post-paid service or a pre-paid service.

Adopting either our primary or alternative recommendation would not be unduly onerous for providers or invasive for consumers. Payday lenders must meet similar obligations to provide loans of under \$2000 – less than the amount of most post-paid phone contracts.⁷ Australians are familiar with providing such information to service providers. Lenders were required to undertake a similar assessment before providing a credit card to the 12.3 million Australians with one or more credit card(s).⁸ Proof of income is needed to secure rental properties.

A robust credit assessment would benefit both consumers and providers. By ensuring that consumer's products are appropriate and affordable, consumers would be less likely to default, and accordingly be less likely to be disconnected from an essential service. It would also benefit providers, by reducing the default rate on telecommunications bills, which is higher than any other type of bill in Australia.⁹

Should adequate provisions fail to be incorporated, this review will have been a missed opportunity to introduce a meaningful credit assessment process that would benefit both consumers and providers.

d) Family violence and customers who are not the principal end user (CI 6.2.1(b))

The existing requirement in Clause 6.2.1(b) that the Supplier inform a customer who is not the principal end user that they remain liable for the service has proved inadequate, especially in the context of

⁷ In addition to the general assessment of suitability, lenders providing payday loans (referred to as small amount credit contracts) must obtain 90 days of bank statements and ensure that the borrower has not had more than two payday loans in the last 90 days (per *Consumer Credit Legislation Amendment (Enhancements) Act (2012)* (Cth), explained in ASIC Report 426, available at <https://download.asic.gov.au/media/3038267/rep-426-published-17-march-2015.pdf>.

⁸ Australian Securities and Investments Commission (ASIC), *Report 580: Credit card lending in Australia* (July 2018) [13], available at: <https://download.asic.gov.au/media/4801724/rep580-published-4-7-2018.pdf>.

⁹ ACCAN, above n 2.

family violence. One of the myriad ways that domestic and family violence presents in the telecommunications sector is when a perpetrator puts all internet and phone accounts in the name of the victim through pressure, fraud, or coercion, thereby leaving the victim of family violence with the legal burden of paying the bill.

CASE STUDY 3: PENNY'S STORY

Penny (name changed) was 18 years old when her boyfriend Matt (name changed) forced her to take out phone plans in his name – one of which was with Telstra. She believes his end game was to on sell the phones and keep the profit. Penny was living at home paying \$50 per week in board and working casually earning at most \$200 a week. She was also paying around \$280 per month towards other phone contracts at the time.

Penny and Matt went into the Telstra shop together and Matt talked specs with the store manager. Penny instructs that it was clear to all that the phone was for Matt and that he was requiring Penny to pay for it. She instructs that initially Matt tried to get the contract in his name, but Telstra refused the application because of his credit history.

Matt settled on a plan that totalled \$240 per month. Penny asked for insurance on the phone and says she was very particular about her address and her email address. She instructs that she asked the Telstra representative to send any correspondence by email to her email address.

Penny's parents did not approve of her relationship with Matt. They thought he was taking financial advantage of her. When Telstra sent the contract details to Penny's parent's email address (not the one Penny specified), her parents asked her to leave their home. She moved in with Matt. She was later asked to leave Matt's home at which time she became homeless.

Penny instructs that Matt sold the phone to a pawnbroker two days after purchase without Penny's consent.

Consumer Action assisted Penny to lodge a complaint with the Telecommunications Industry Ombudsman against Telstra. The matter has since resolved.

Source: Consumer Action

Our concerns are firstly that these clients should not have been contracted or made liable for services at the first instance, and secondly that there is strenuous resistance by telecommunications providers in unwinding these unfair and inappropriate arrangements once the family violence has become known.

The following recommendation is based on guidance that applies in the finance sector, particularly that of the Financial Ombudsman Service.¹⁰

¹⁰ See Financial Ombudsman Service Australia, *The FOS Approach to Joint Faculties and Family Violence*, in particular (Version 3 – March 2017), in particular p 7, available at: <https://www.fos.org.au/custom/files/docs/fos-approachjoint-facilities-and-family-violence-final-4-may-17.pdf>

RECOMMENDATION 5:

- a) A Supplier should not accept a customer for a telecommunication service if it is aware that the customer will not benefit from the service. Where a customer did not benefit from the service, and the Supplier was, or should have been, aware of this at the time of provision of service, the Supplier should release the customer from liability for the service; and
- b) The Supplier should also adopt measures to identify situations where a customer is unlikely to benefit from the service, including:
 - i) Where bundled or multiple contract sales occur;
 - ii) Where customers already have a service but are requesting multiple services; or
 - iii) Where a person other than the account holder is trying to change the account or increase the service.

We are aware that work is underway on a guidance note on family violence for the telecommunications industry. However, amendments to the TCP Code are required on a range of issues to give effect to the recommendations of the Victorian Royal Commission into Family Violence, and to ensure that the telecommunications industry is appropriately responding to, and not facilitating, domestic and family violence.

An exhaustive list of the changes to the TCP Code needed in respect of family violence is beyond the scope of this submission. However, we strongly recommend that the Working Committee consult with and adopt the recommendations of the Economic Abuse Reference Group.¹¹

RECOMMENDATION 6: Consult with, and adopt the recommendations of, the Economic Abuse Reference Group on changes to the TCP Code needed to address and prevent domestic and family violence.

4. Financial hardship

We have serious concerns about the hardship practices of telecommunications providers, and the deficiencies in the hardship provisions of the draft Code.

We refer to Margaret's story (Case Study 1, above) and Lon's story (Case Study 4, below), which are but two of the many appalling responses to financial hardship that our caseworkers have seen.

We strongly endorse the comments and recommendations in respect of financial hardship made by:

1. ACCAN in its submission to this consultation; and
2. FCRC in its 'Rank the Telco' Report.

5. Notice to restrict, suspend or disconnect a service

Under the Code, suppliers must give 5 working days' notice before restricting, suspending or disconnecting a service. However, the exception in clause 6.8.1(a)(i) allows providers to give no notice when the 'Supplier assesses that the Customer or the account status presents an unacceptably high credit risk to the Supplier'.

¹¹ See <https://earg.org.au/>.

This exception is unfair and should be removed from the TCP Code. We also question whether this is consistent with the unfair contract provisions of the ACL. It is perverse that suppliers do not need to undertake a meaningful credit assessment but can terminate services at will based on its own, undefined, assessment of credit risk.

RECOMMENDATION 7: Remove Clause 6.8.1(a)(i) from the TCP Code.

6. Customer Service

Poor customer service practices, and lack of access to documents, have been an ongoing source of frustration for our caseworkers, and a significant drain on our limited time and resources.

It is not unusual for clients to approach our services not out of confusion about their legal rights or responsibilities in a telco dispute, but rather out of frustration at their inability to progress their complaint beyond frontline staff who are unable or unwilling to understand or resolve the query.

We note the findings of ACCAN's 'Can You Hear Me' Report, which are also included in ACCAN's submission to this draft TCP Code review:

- It takes on average 13 days and 2.6 contacts to resolve an enquiry or complaint (based on resolved cases only).
- For cases still unresolved at the time of the survey the average time spent seeking a resolution increased to 60 days.
- Even for simple enquiries such as changing a plan or updating contact details takes time (10.4 and 11.3 days respectively).
- To contact a provider by phone requires waiting 1.2 hours on average before reaching the right person to talk to.
- Providers are failing to keep adequate records of customer issues and enquiries with 58% of respondents saying they were required to re-provide information on average 3.7 times. 26% of these people had to repeat the information of their case more than five times.
- 55% of respondents who said they looked for information about how to lodge a complaint said it was difficult to find. Only 18% of respondents who lodged a formal complaint with their provider found the process easy.
- Respondents were particularly critical of their provider keeping them proactively informed, providing a timely resolution, and the knowledge of customer service staff.¹²

The findings in respect to hold time, case resolution timeframes, and the requirement to repeat or re-provide information to a provider are unacceptable: they are powerful disincentives and barriers to consumers who wish to communicate or raise issues with their provider.

These unacceptable standards must be addressed. Given the ongoing culture of poor customer service captured by the 'Can You Hear Me' and 'Rank the Telco' reports, we consider baseline minimum customer service timeframes are required.

RECOMMENDATION 8: We endorse ACCAN's recommendation to reduce time taken to resolve customer issues by adding the following provision to CI 4.9.1:

¹² ACCAN, above n 1, 11-12.

‘(i) Suppliers must deal with simple enquiries within a maximum of two working days, and more complex inquiries within five working days.’

Additionally, we recommend that CI 4.9.1 then state:

‘(ii) If an enquiry cannot be dealt with within the timeframes stipulated at (i), the provider must escalate the matter to internal dispute resolution, and

1. advise the customer that this has occurred;
2. provide the customer with contact details to the relevant internal dispute resolution case manager or department;
3. advise the customer that the complaint handling timeframes prescribed by the *Telecommunications (Consumer Complaints Handling) Standard 2018* apply; and
4. advise the customer of their right to escalate the matter to external dispute resolution in the event that it cannot be resolved within internal dispute resolution timeframes.’

RECOMMENDATION 9: We endorse ACCAN’s recommendation to reduce customer service wait times by adding the following wording to CI 4.9.1(b):

- ‘Telephone contact: Customer wait times to be connected to the right customer service area to handle an enquiry must be kept to a maximum of five minutes.
- Live chat: an acknowledgement to an enquiry must be provided within two minutes.
- Other contact methods: email, online and social media inquiries must be acknowledged by the Supplier within one working day.’

7. Access to documents

Consumers often need access to basic documents and information held by the telecommunications provider. Our caseworkers request documents for various purposes including: to assist a client to review and understand their contract with a provider; to assist a client to understand the basis of an alleged debt; to assess whether or not a debt is owed; and to substantiate claims made by either side in a dispute.

The Australian Privacy Principles¹³ provide for access to documents held about a person by an entity. Documents about a person include: contract documents, correspondence, recorded phone calls, and client interaction notes. Despite this statutory requirement to provide documents, there is significant resistance across the industry to provide documents when sought.

Barriers to access of documents erected by providers include: procedural hurdles, delays and fees.

Procedural hurdles

One provider has a requirement that even once a TIO complaint has been raised, a separate request for personal information documents must be made online individually by a client to a department completely separate from the complaint or IDR process.

We recommend that customer service and complaints handling staff should be required to either respond to requests for documents themselves, or be responsible for delivering the information request to the provider’s privacy department and delivery of the documents to the consumer once released by the privacy department.

¹³ Schedule 1 of the *Privacy Act 1988* (Cth).

Delays

Even where the documents requested are provided, it is often after considerable delay. Stricter timeframes on the provision of documents by providers to consumers are needed. By comparison, in consumer credit matters, the National Credit Code¹⁴ provides strict timeframes for the provision of basic documents, generally 14 or 30 days depending on the type and age of the document. For example, a copy of the credit contract must be provided with 14 days of request if that credit contract was created in the preceding 12 months, or 30 days if the document is older.¹⁵ We recommend that the same timeframe requirements be incorporated to the TCP Code.

Fees

Some providers seek payment of an administrative fee for access to call recordings or client interaction notes, and place onerous evidentiary requirements on applications for waiver of that fee.

Part 8.1.1 of the TCP Code previously provided that a supplier must implement, operate and comply with a Complaint handling process that:

- (i) is consumer focused and easy to use;
- (ii) is free of charge, other than for:
 - A. the call costs referred to in clause 8.1.1(a)(vii)A;
 - B. the provision of information where:
 - a Consumer or former Customer requests access to information held by the Supplier about the Consumer or former Customer which was collected by the Supplier more than 2 years prior to the date of the request, unless the Complaint relates to an interference with the privacy of the Consumer under the Privacy Act by the Supplier; or
 - the free provision of the information in the form or quantities requested is inconsistent with the Supplier's Standard Form Customer Contract or the relevant summary of the Offer referred to in clause 4.1.1, unless the Complaint relates to an interference with the privacy of the Consumer under the Privacy Act by the Supplier;

in which circumstances, the Supplier may levy a charge to recover its costs. The Supplier must inform the Consumer or former Customer of the proposed charge and notify the Consumer or former Customer of the option to pursue the Complaint and pay the charge or to discontinue the Complaint. The Supplier must tell the Consumer or former Customer about the options for external dispute resolution before levying any Charge under this paragraph.

This curiously drafted provision is habitually ignored by providers, and has now been removed from the draft TCP Code without being replicated in the *Telecommunications Consumer Complaint Handling Standard 2018*.

RECOMMENDATION 10:¹⁶ The TCP Code should require telecommunications providers to provide basic documents relevant to the dispute and other personal information:

- a) without onerous procedural hurdles;
- b) within 14 days, or 30 days where the document is older than 12 months, of request;
- c) free-of-charge or, alternatively, free for a copy of contracts, correspondence, call records or client interaction notes. If fees are to be levied for the provision of documents, the TCP Code should specify what fees may be levied and how.

¹⁴ *National Consumer Credit Protection Act 2009* (Cth) Sch 1.

¹⁵ *National Consumer Credit Protection Act* (2009) Sch 1 s 185.

¹⁶ We note that our organisations have submitted in a submission to the 2018 Consumer Safeguards Review (Part A) that Recommendation 8 be adopted into the *Telecommunications (Consumer Complaints Handling) Standard 2018*.

CASE STUDY 4: Lon's story

Lon* (name changed) approached WEstjustice with issues in relation to two accounts with her provider: a mobile phone and a landline. Lon was experiencing serious financial hardship. Her relationship had broken down due to family violence, and she was struggling to make mortgage repayments, pay bills, and care for her children. She was at risk of losing her home and extremely distressed about her financial situation.

Lon was confused about her phone accounts: she had called her provider on a number of occasions to ask about how to pay her bills for her mobile phone and was advised that she did not have a mobile phone account. By the time Lon saw WEstjustice, her mobile phone no longer made or received calls. Lon also had an issue in relation to her landline account, as she disputed the final bill for that account because her provider had given her contradictory advice by phone. Lon had already made a TIO complaint by the time she saw WEstjustice, and had received an email response from her provider.

WEstjustice helped Lon to reply to her provider's response to her TIO complaint, seeking further clarification in respect of both accounts, and requesting client interaction notes for both accounts. The provider's representative responded that it could not receive a request for client interaction notes by email, and that a request would need to be made via the provider's website or by post. The provider's website stated that a fee may be imposed for requests for client interaction notes, but that a hardship application could be made in respect of that fee.

WEstjustice wrote to Lon's provider on her behalf, requesting client interaction notes and seeking fee waiver for the information request. Lon's financial circumstances were set out in detail, as were her extenuating personal circumstances.

WEstjustice later received a telephone call from a representative of the provider. The representative appeared to have confused the request for fee waiver for a debt waiver request in respect of the alleged account balances. When this was clarified with the representative, the representative became defensive and told WEstjustice that insufficient evidence of financial hardship had been provided in any case, and that WEstjustice would need to provide a financial ledger and three months of bank statements. The representative also said that unless the hardship demonstrated that the hardship was of a short-term basis, no fee waiver would be available.

WEstjustice responded to the provider's representative by referring to Part 8.1.1 of the TCP Code. The provider's representative stated that that provision did not apply as no complaint had been raised by Lon or by WEstjustice on Lon's behalf. When WEstjustice pointed out that a TIO complaint had been made in this matter, and moreover that the written request for documents was at the direction of the provider's TIO response, the representative became hostile and made a personal attack on the capacity of the WEstjustice advocate. When WEstjustice asked for the matter to be transferred to a different representative as a further complaint, the representative responded that this was not possible and that the matter could not be escalated beyond her.

Lon's case is ongoing.

Source: WEstjustice

8. Poor record keeping

ACCAN's finding that 58% of consumers who were required to contact their provider more than once about an issue were required to re-submit details of their complaint at each contact is consistent with our experience as consumer advocates dealing with telecommunication providers.

Even once a matter has been escalated to an IDR or specialist team, responses to calls or emails are rarely from the same representative, and consumers and advocates alike are required to repeatedly set

out the basic background to a dispute and the resolution sought. Improved record keeping would address this issue.

We note that when client interaction notes *are* received upon request, the notes returned tend to be vague, difficult to decipher, and focused on the action (or inaction) of the provider, rather than the questions or issues raised by the consumer.

RECOMMENDATION 11: We endorse ACCAN's Recommendation 11 that CI 4.6.1(d) be amended to read:

'Keep records of interactions between the Supplier and Customers *immediately* accessible to staff tasked with responding to such Customer Service enquiries, to aid in resolving Customer Service enquiries.'

We add to that recommendation that:

'Records should include a detailed account of the Customer's enquiry or complaint, as well as a detailed account of the advice given, and action taken, by the telecommunications provider.'

9. Debt buyers

The new Australian Financial Complaints Authority will replace the two ASIC-approved external dispute resolution schemes, the Financial Ombudsman Service and the Credit and Investments Ombudsman, on 1 November 2018. Clause 6.11.4 of the draft Code states that:

Debt buyers: A Supplier must only sell a debt to a debt buyer if that debt buyer is a member of an ASIC approved external dispute resolution scheme.

RECOMMENDATION 12: Update CI 6.11.4 to refer to the Australian Financial Complaints Authority instead of an ASIC-approved external dispute resolution scheme.

10. Code compliance and monitoring (Chapter 10)

An industry code is only as good as its compliance mechanism. In our casework, we consistently see widespread non-compliance with the TCP Code. When raising breaches of the Code in legal correspondence, telecommunications providers generally do not seem concerned about the consequences of breach. We agree with the view that compliance with the TCP Code is 'largely premised on industry goodwill.'¹⁷

In this context, it is disappointing that the draft Code contains no changes to Chapter 10.

The compliance mechanisms in the TCP Code are significantly below the standard of other consumer industry compliance bodies such as those in the banking and insurance industries, which are themselves broadly accepted as bare minimums. It appears that Communications Compliance's main role is to chase up late self-attestation certification that providers have complied with the Code, and

¹⁷ Financial Counselling Australia, 'Hardship Policies in Practice: A Comparative Study' (2014), 14-16; P Ali, E Bourova and I Ramsay, 'Responding to Consumers' Financial Hardship: An Evaluation of the Legal Frameworks and Company Policies' (2015) 23 *Competition and Consumer Law Journal* 23, 41, available at: <https://ssrn.com/abstract=2657409>.

review websites to ensure policies and critical information summaries are available. There is little to no monitoring of providers' *conduct* in (mis)selling, service provision, and (poor) customer service.

Both the ACMA, as the regulator responsible for code compliance, and Communications Compliance must have adequate resourcing and powers to take swift and effective action in response to non-compliance. Each must take a proactive approach to investigating possible breaches, and each should be resourced to accept and investigate complaints or issues, including where discrete instances of non-compliance are raised directly by consumers or consumer advocates.

We understand that Communications Compliance has indicated a desire to take a more active role in monitoring, include initiating own motion inquiries. However, in our view, it will continue to be ineffective and hamstrung until Chapter 10 of the TCP Code receives a substantial overhaul.

RECOMMENDATION 13: Review the code compliance and monitoring framework for the TCP Code.

11. Process for review of the TCP Code

We are concerned that the review of the TCP Code is dominated by industry and proceeded without a transparent process to identify and address current consumer issues in the telecommunications sector.

It appears that the Working Committee is imbalanced, with four voting industry representatives and only two voting consumer representatives. The Working Committee met to discuss the text of various chapters of the existing code, without the benefit of transparent and public consultation about the issues that the community expects to be addressed by this review.

This process for this review can be contrasted with review of codes in other industry sectors.

The Review of the Code of Banking Practice commenced 2016 with the appointment of an independent reviewer. There were two rounds of public consultation: firstly, initial comment on stakeholder experience with the Code and views about how it might be improved; and secondly, following the testing of the ideas that emerged in the first round of consultation, and an opportunity for further comment. A website was established to keep stakeholders informed about the progress of the review.¹⁸

The General Insurance Code of Practice was reviewed in 2017. This review similarly began with public consultation on terms of reference. An interim report was developed and released for public consultation. Again, a website was established to assist with stakeholder engagement, with all submissions published.¹⁹

We agree with the concerns raised by the Financial & Consumer Rights Council that, despite the best efforts of all involved on the TCP Code Review Working Committee:

the inadequacies of this process flow through into a Code that does not create a clear and enforceable set of consumer protections, and makes it difficult for the TIO to resolve consumer complaints with fair outcomes.²⁰

RECOMMENDATION 14: The periodic review of the TCP Code should: be conducted by an independent reviewer; include early public consultation on the terms of reference to ensure all

¹⁸ See <http://cobpreview.crkhoury.com.au/>

¹⁹ See <http://codeofpracticereview.com.au/>

²⁰ Financial & Consumer Rights Council, Submission to the Consumer Safeguards Review Part A, 4.

relevant issues are identified; be funded separately and include funding and support for extensive consumer advocate involvement. Industry should be consulted on the Code review, but not control or dominate the process.

Please contact Tess Matthews on (03) 9749 7720 or at tess@westjustice.org.au if you have any questions about this submission.

Yours sincerely



Denis Nelthorpe AM
Chief Executive Officer
WEstjustice



Gerard Brody
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Consumer Action Law Centre

APPENDIX A: LIST OF RECOMMENDATIONS

a) Our recommendations

RECOMMENDATION 1: Unsolicited sale of telecommunications products and services should be prohibited by TCP Code.

RECOMMENDATION 2: The TCP Code be amended, to incorporate a new clause under the heading 'unsolicited sales' that provides:

'In respect of unsolicited telesales -

1. In order for a contract to commence, a consumer must *opt in* at the conclusion of the cooling off period provided by the Australian Consumer Law.
2. Providers must publish guidance on the minimum requirements for informed consent to unsolicited transactions.
3. Providers must retain a recording of the complete telemarketing call (including the 'pre-sale' part) to demonstrate that informed consent in an unsolicited transaction is present. The recording must be retained for a minimum of six years.'

RECOMMENDATION 3: Industry adopt a more ethical and consumer-oriented approach to sales practices. This requires aligning sales incentives with positive customer outcomes, and puts a greater onus on retailers to enquire about a customer's needs and circumstances, to ensure that are selling appropriate products to customers. Specifically, that:

- a) The following wording be added to paragraph 4.6.1: 'Sales incentives should promote responsible and ethical selling, that actively takes account of the consumer's requirements. Targets and incentives for staff must be aligned with long-term consumer outcomes, rather than short-term sales.'
- b) The following wording be added to paragraph 4.6.2: 'The supplier actively must actively take account of customer circumstances and provide customers with appropriate products and services, including lower/all cost options'.
- c) The following paragraph should be added to Chapter 3: '3.3.6: Suppliers must ensure that customer service staff receive training to deal with disadvantaged and vulnerable customers, and are able to deal with disadvantaged and vulnerable customers appropriately.'
- d) A post-sales support paragraph be added as follows: 'Customer service staff must contact new customers after three billing cycles to see if the customer needs further assistance in understanding their obligations.'

RECOMMENDATION 4: Industry adopt a robust process to assess the suitability and affordability of post-paid services, based on the requirements for consumer credit providers in the *National Consumer Credit Protection Act 2009* (Cth). The TCP Code should require that:

- a) Suppliers conduct an assessment that a post-paid service is 'not unsuitable' for the consumer.
- b) A post-paid service must be assessed as unsuitable where, at the time of the assessment, it is likely that:
 - i) The service does not meet the consumer's requirements and objectives; or
 - ii) The consumer will be unable to meet their payment obligations, either at all or only with substantial hardship.
- c) In undertaking the assessment, the Supplier must

- i) Make reasonable inquiries about both the consumer's requirements and objectives and their financial situation; and
 - ii) Take reasonable steps to verify the consumer's financial situation.
- d) Suppliers must not supply a service that is assessed as unsuitable.

ALTERNATIVELY, the TCP Code should require, at a bare minimum, that:

- a) In conducting a credit assessment, Suppliers must obtain and assess:
 - i) Proof of income (bank statements, payslip or Centrelink statement); and
 - ii) Proof of housing costs (rent receipt, copy of lease, mortgage repayments).

Suppliers must not supply a proposed post-paid service where the credit assessment shows that the customer could not afford payment obligations at all or only without substantial hardship.

RECOMMENDATION 5:

- a) A Supplier should not accept a customer for a telecommunication service if it is aware that the customer will not benefit from the service. Where a customer did not benefit from the service, and the Supplier was, or should have been, aware of this at the time of provision of service, the Supplier should release the customer from liability for the service; and
- b) The Supplier should also adopt measures to identify situations where a customer is unlikely to benefit from the service, including:
 - i) Where bundled or multiple contract sales occur;
 - ii) Where customers already have a service but are requesting multiple services; or
 - iii) Where a person other than the account holder is trying to change the account or increase the service.

RECOMMENDATION 6: Consult with, and adopt the recommendations of, the Economic Abuse Reference Group on changes to the TCP Code needed to address and prevent domestic and family violence.

RECOMMENDATION 7: Remove Clause 6.8.1(a)(i) from the TCP Code.

RECOMMENDATION 8: We endorse ACCAN's Recommendation 8 to reduce time taken to resolve customer issues by adding the following provision to CI 4.9.1:

- (i) Suppliers must deal with simple enquiries within a maximum of two working days, and more complex inquiries within five working days.'

Additionally, we recommend that CI 4.9.1 then state:

'(ii) If an enquiry cannot be dealt with within the timeframes stipulated at (i), the provider must escalate the matter to internal dispute resolution, and

1. advise the customer that this has occurred;
2. provide the customer with contact details to the relevant internal dispute resolution case manager or department;
3. advise the customer that the complaint handling timeframes prescribed by the *Telecommunications (Consumer Complaints Handling) Standard 2018* apply; and
4. advise the customer of their right to escalate the matter to external dispute resolution in the even that it cannot be resolved within internal dispute resolution timeframes.'

RECOMMENDATION 9: We endorse ACCAN's Recommendation 9 to reduce customer service wait times by adding the following wording to CI 4.9.1(b):

- 'Telephone contact: Customer wait times to be connected to the right customer service area to handle an enquiry must be kept to a maximum of five minutes.
- Live chat: an acknowledgement to an enquiry must be provided within two minutes.
- Other contact methods: email, online and social media inquiries must be acknowledged by the Supplier within one working day.'

RECOMMENDATION 10: The TCP Code should require telecommunications providers to provide basic documents relevant to the dispute and other personal information:

- a) without onerous procedural hurdles;
- b) within 14 days, or 30 days where the document is older than 12 months, of request;
- c) free-of-charge or, alternatively, free for a copy of contracts, correspondence, call records or client interaction notes. If fees are to be levied for the provision of documents, the TCP Code should specify what fees may be levied and how.

RECOMMENDATION 11: We endorse ACCAN's Recommendation 11 that CI 4.6.1(d) be amended to read:

'Keep records of interactions between the Supplier and Customers *immediately* accessible to staff tasked with responding to such Customer Service enquiries, to aid in resolving Customer Service enquiries.'

We add to that recommendation that:

'Records should include a detailed account of the Customer's enquiry or complaint, as well as a detailed account of the advice given, and action taken, by the telecommunications provider.'

RECOMMENDATION 12: Update CI 6.11.4 to refer to the Australian Financial Complaints Authority instead of an ASIC-approved external dispute resolution scheme.

RECOMMENDATION 13: Review the code compliance and monitoring framework for the TCP Code.

RECOMMENDATION 14: The periodic review of the TCP Code should: be conducted by an independent reviewer; include early public consultation on the terms of reference to ensure all relevant issues are identified; be funded separately and include funding and support for extensive consumer advocate involvement. Industry should be consulted on the Code review, but not control or dominate the process.

b) ACCAN recommendations that we endorse

In addition to the ACCAN recommendations endorsed and elaborated upon in A above, we endorse the following recommendations made by ACCAN in its submission:

RECOMMENDATION 1: There should be no charge for providing a bill in the format chosen by the customer.

RECOMMENDATION 2: There should be a free method of bill payment offered in addition to direct debit

RECOMMENDATION 3: Suppliers must not bill for Third Party Charges without direct account holder activation of this facility with the Supplier; ie must be opt in, not opt out.

RECOMMENDATION 4: Suppliers must set the default spend limit for Third Party Charges at \$0, and upon account holder activation of Third Party Charging, apply the spend limit amount selected by the account holder

RECOMMENDATION 5: Suppliers must not bill for Third Party Charging if a double opt-in arrangement for each third party billed service is not in place.

RECOMMENDATION 6: Suppliers must not bill for Third Party Charges if the Consumer has sent a STOP request to the third-party service.

RECOMMENDATION 7: The maximum time permitted for provision of the usage alerts under 6.6.2 should be substantially reduced to 1 hour.

RECOMMENDATION 10: The following wording should be added to 4.9.1(c):

and,

'Ensure that simple account administrative enquiries are resolved at first contact (for example change of contact details, requests to change plans, general account enquiries).'

RECOMMENDATION 12: The following wording should be added to 4.6.1(e): 'and have the knowledge and ability to do so.'

RECOMMENDATION 13: That the Code be amended to allow customers to have access to records of their interactions with suppliers, on request of the customer.

RECOMMENDATION 14: The definition of consumer should be altered so that the spend limit for small businesses is matched to that in the Australian Consumer Law.

RECOMMENDATION 15: 4.1.4(b) should specify what other types of information a supplier 'may include'.

RECOMMENDATION 22: The following wording should be added to 7.1.1 Access to policy: 'In addition, financial hardship policies must be available in stores, on bills and in relevant communications with customers, alongside the direct contact details (email, phone number, live chat etc) for financial hardship staff.'

RECOMMENDATION 23: The following should replace 7.2.1(a): 'a customer in financial hardship should not be denied access to essential telecommunications services, face legal action, be given a credit default listing, or have to pay any debt recovery costs. At a minimum the following must be included in a Financial Hardship policy:

- Late payment fees should be waived for customers in financial hardship; cancellation fees should be waived for customers in serious hardship.
- Flexible payment options including: extensions to payment times; payments to be made in instalments over longer period; incentives for making payments; low cost interim options until the customer can continue with original payments; payment vouchers distributed to clients by financial counsellors.
- Hard caps and shaping.
- Restructuring of customer's account.
- Transferring the customer to pre-paid services.
- Releasing a customer from their debt in situations where their financial hardship is entrenched.

- When a provider has been found to have used irresponsible sales practices, a customer's debt should be waived.'

RECOMMENDATION 24: The word 'designed' be replaced with 'suitable'. 4.7.1 should read (amendment in italics): 'A Supplier must make information available about Telecommunications Products offered by the Supplier ***suitable*** for Consumers with different disabilities...'

RECOMMENDATION 25: The following amendment (in italics) should be made to 3.2.5: 'A supplier must ***ensure*** its web content complies with...'