



**Submission by the
Financial Rights Legal Centre**

Communications Alliance Ltd

Draft Telecommunications Consumer Protections
Code, July 2018

August 2018

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took close to 25,000 calls for advice or assistance during the 2016/2017 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

National Debt Helpline 1800 007 007
Insurance Law Service 1300 663 464
Mob Strong Debt Help 1800 808 488

Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Draft Telecommunication Consumer Protections Code (**TCP Code**) The Financial Rights Legal Centre (**Financial Rights**) will address those part of the Code that most relate to the issues we have expertise and experience in arising out of our casework on the National Debt Helpline, the Insurance Law Service and Mob Strong Debt Help.. We have also had the opportunity to read over a draft of the Australian Communications Consumer Action Network (**ACCAN**) submission to the review and have strongly support the recommendations made in that submission.

Billing fees

Financial Rights strongly believes that Suppliers should not be able to charge for the provision of a Bill and believes that the TCP Code should prohibit the practice.

Currently those who can least afford to pay paper billing fees are those who inevitably must pay for receiving their bills. Paper billing fees is a regressive tax on the most financially vulnerable consumers in Australia. There are many people who need to opt for paper communications and they should not be penalised for doing so through the levying of a fee.

There are many reasons why people may opt for paper billing. For instance, they may not be able to afford access to the internet. These people tend to be lower income Australians whose sources of income are, for example, unemployment benefits, disability payments or the aged pension. Many callers to our Centre have intermittent access only to the internet depending on their capacity to pay for credit on their phone in any given period – this is clearly inadequate for the timely receipt of bills.

According to the Australian Bureau of Statistics (**ABS**) only 70 per cent of those not employed were internet users.¹ For those in the lowest income quintile almost only 67 per cent were internet users. Households located in remote or very remote parts of Australia were less likely to have internet connections than their urban counterparts (79 per cent). Among the main reasons given for not accessing the internet at home were a lack of confidence or knowledge (22 per cent), and cost (16 per cent).²

There are others who simply cannot access the internet, be it because it is not available in rural and remote areas or they do not have the requisite knowledge or experience to use electronic communications, for example older Australians. According to the ABS only 51 per cent of people over 65 use the internet.³

¹ ABS, 8146.0 - Household Use of Information Technology, Australia, 2014-15, 18 February 2016
<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>

² *ibid*

³ *ibid*

Charging a fee on those on the wrong side of the digital divide is disproportionate and only exacerbates financial hardship. They are in a sense being penalised for being poor.

Electronic billing often makes it more difficult for some consumers to access and physically review their detailed bills. Many consumers engage less with electronic mail given the large amounts of email received. The push toward electronic billing also drives consumers to use more internet based services, passing on the companies' the cost of printing and mailing bills to the consumer.

The costs of the billing process should be folded into the administration of the communications service. This should be the price of doing business. Any claims for a decrease in paper waste or decreasing environmental impact should be treated with a grain of salt and be seen for what it is: an act of greenwashing to make the organisation seem more environmentally conscious.

We therefore strongly support the recommendations by ACCAN that there should be no charge for providing a bill in the format chosen by the customer.

We also support the recommendation by ACCAN that there should be a free method of Bill payment that is not direct debit. We agree that consumers on low fixed incomes prefer to pay their bills by methods other than direct debit, in order that they are better able to control and manage their tight finances. Again, the poor should not be penalised by communications companies for being poor.

With respect to the billing of Third Party Charges we strongly support the recommendations by ACCAN that Suppliers must not bill for Third Party Charges without explicit, direct account holder activation of this facility with the Supplier. In other words it should be opt in, not opt out. We believe the specific recommendations put forward by ACCAN should be instituted under the TCP Code, ie

- 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
- Suppliers must not bill for Third Party Charging if a double opt-in arrangement for each third party billed service is not in place
- Suppliers must not bill for Third Party Charges if the Consumer has sent a STOP request to the third party service

Recommendations

1. The TCP Code should prohibit charges for providing a bill in the format chosen by the customer
2. The TCP should mandate a free method of Bill payment that is not direct debit.
3. Suppliers must not bill for Third Party Charges without explicit, direct account holder activation of this facility with the Supplier.

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

Our financial counsellors on the National Debt Helpline regularly hear from people who have phone contracts that are too much for them or simply not appropriate to their needs or financial situation. This is in part to poor credit assessment process (to be discussed below/above) but is also a symptom:

- i. an overzealous, pushy sales culture that consistently fails consumers by upselling to inappropriate expensive products
- ii. exploitation of complex, complicated and confusing plans, options, offers, and services
- iii. a systemic inability to recognise consumers experiencing some form of vulnerability be it lack of financial literacy, mental health issues, English as a second language, disability and mental health issues, domestic violence and other common circumstances.

Consumers facing financial hardship find it particularly difficult to negotiate affordable repayment arrangements or cancel contracts where they have been sold bundled plans that include expensive handsets and/or tablets or other bundled services.

Minimum costs are often disclosed, but consumers on low income are not provided sufficient information nor options to, for example, sign up for a maximum cost plan which would limit their spending.

We also see too many consumers who cannot afford plans offered upgrades to the latest attractive handsets and tablets which retain consumers in unaffordable lock in contracts.

The TCP Code's approach to selling is particularly weak compared to other industry Codes (such as the Life Insurance Code of Practice⁴) and needs to take a much stronger line with Supplier processes and responsibility with respect to the sales practices of their representatives.

We note that under Fair Sales Practices under a clause 4.6.1 that

⁴ <https://www.fsc.org.au/policy/life-insurance/code-of-practice/life-code-of-practice>

A Supplier must ensure its Sales Representatives promote and sell its Telecommunications Products in a fair, transparent, and accurate manner to assist Consumers in making informed purchasing decisions.

We would recommend the addition of honesty as an element to the manner in which sales representatives take to the sales process. As a principle this should be an uncontroversial and appropriate addition to this clause. We note that honesty is included as the first key commitment and this should be referred to explicitly here as a specific and direct reminder to Sales Representatives being trained in the Code.

We agree with ACCAN's recommendation that an additional element should be added to 4.6 that the supplier must actively take account of customer circumstances and provide them with appropriate products and services, including lower/all cost options.

With respect to the Supplier providing ongoing monitoring under clause 4.6.1(b) we recommend that sales should be monitored to ensure sales are appropriate, as a general principle. It is subsequent to this aim that Suppliers then identify and address emerging or systemic deficiencies in the sales conduct. Furthermore information and data relating to this monitoring needs to be reported to the Communications Alliance on an annual basis and published in some form.

Financial Rights also notes that there is no commitment to actually establishing sales rules to ensure that sales representatives conduct the sales process in an appropriate manner or prevent unacceptable practices. There is training, monitoring and other processes but no sales rules document to guide sales representatives. The closest thing to a set of rules is "Clear communication of what are considered unacceptable and improper sales practices" under the guidance document, however this is not mandatory and only considered best practice. In other words aspirational. Committing to a set of sales rules should be a minimum standard for Suppliers in order to promote consistent appropriate selling and be able to appropriately measure performance against.

Suppliers should therefore be expected to establish and maintain a framework to monitor compliance with their sales rules, including quality assurance measures for reviewing sales such as call monitoring, mystery shopping and post-sale call surveys; and analysis and reporting on key data, such as sales results, lapses and complaints.

Financial Rights does not understand rationale for removing the phrase "and seek to increase" from clause 4.6.1(c). We believe that this should be maintained in order to incentivise the Supplier and the Sales Representative to establish a sales process that does not lead to extended complaints processes.

Finally the TCP Code should explicitly state that pressure selling and other unacceptable sales practices should not be permitted. Instead it is currently listed only in the guidance⁵ as a best practice. Given other industries such as life insurance have committed to eradicating such practices we think it is about time communications companies commit to the same.

⁵ http://www.commsalliance.com.au/_data/assets/pdf_file/0004/59053/IGN013-Sales-Practices-and-Credit-and-Debt-Management-FINAL-v2.0.pdf

Add-on mobile phone/device insurance

Financial Rights, along with the Australian Securities and Investments Commission (**ASIC**), has serious concerns with respect to the sales practices relating to junk add-on insurance products. One of the more notorious products of this ilk is mobile phone insurance. Mobile phone insurance is regularly pushed on to consumers by sales representatives who claim that the consumer will be left in a financial hole if the phone is lost or stolen. Rarely do the sales representatives inform the consumer of all the details including:

- Exclusions: common exclusions include⁶:
 - accidental loss or mechanical damage
 - Phones that are: stolen in an unlocked vehicle, visible in a vehicle, or left unattended in a public place
 - General wear and tear, gradual deterioration or developing flaws
 - Restoration of electronic records
 - Loss of stored files from a claimable event or a virus or hacker
- Specific requirements relating to coverage including:
 - Replacement if the device is stolen (but generally only with a police report within 48 hrs)
 - Reimbursement of unauthorised calls (but usually only up to a couple of hundred dollars)
 - Mechanical failure (but only some policies cover this)
 - Accessories, like earphones, headsets, cases or your mouse (this feature is fairly rare, but can provide cover up to a couple of hundred dollars)

And then there are even more absurd exclusions that the unsuspecting customer will be wholly unaware unless they read the fine print. Vodafone Cover Me Mobile Insurance for example excludes loss or damage from fire. It also excludes the incredibly vague:

“Any loss, theft or damage or malfunction where no actual known or identifiable event can be attributed to causing the loss, theft or damage.”

We note that in 2016 Optus refunded approximately \$2.4 million (including interest) to around 175,000 Optus mobile phone insurance customers.

ASIC’s concerns arose after Optus reported a breach about its failure to provide certain customers with a Product Disclosure Statement and a Financial Services Guide. This breach affected customers who purchased mobile phone insurance in store or by telephone, and

⁶ <https://www.moneysmart.gov.au/insurance/mobile-phone-tablet-laptop-insurance>

*occurred over a number of years. As a result, many customers may not have been aware of certain key features and limitations of the insurance that they purchased.*⁷

Optus reported four further breaches to ASIC following ASIC's investigation. Optus mobile phone customers:

1. *did not receive one month free insurance under a promotional offer they were entitled to;*
2. *were incorrectly charged a premium for insurance during a 'rain-check' period;*
3. *were not provided with the required information before purchasing an insurance policy over the telephone (e.g. information about excesses and cooling-off rights); and*
4. *were issued the wrong cover. Some customers received 'Device Insurance' cover instead of the more favourable and less expensive 'Yes Cover'.*

ASIC stated that they were concerned that the breaches indicated that:

Optus had inadequate compliance systems and processes, such as training, monitoring and supervision of staff.

There is currently extensive work being conducted by both ASIC and the financial services sector to reign in the worst excesses of add-on insurance sales practices.

ASIC is currently working on introducing new deferred sales period of the sale of add-on insurance in car yards.⁸

The Banking sector has preemptively acted with the introduction of new Banking Code of Practice commitments to a deferred sales period for the sale of Consumer Credit Insurance for credit cards and personal loans sold in branches or over the phone. The Banking Code now states:

67. If we offer CCI for credit cards and personal loans through a branch or over the phone, then we will not offer that product to you until at least four days after you have applied for the credit product. This is known as a 'deferred sales period'.

*68. We can still provide factual information on CCI for you to consider during the deferred sales period.*⁹

The General Insurance sector is also proposing increased self-regulation in this area with the Code of Practice Review Report proposing to introduce a best practice product design and

⁷ ASIC, 16-222MR Optus to refund more than \$2 million to mobile phone insurance customers following ASIC concerns, 12 July 2016 <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-222mr-optus-to-refund-more-than-2-million-to-mobile-phone-insurance-customers-following-asic-concerns/>

⁸ 17-280MR ASIC consults on reforms to add-on insurance sales to drive better outcomes for consumers, 24 August 2017 <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-280mr-asic-consults-on-reforms-to-add-on-insurance-sales-to-drive-better-outcomes-for-consumers/>

⁹ https://www.ausbanking.org.au/images/uploads/Banking_Code_of_Practice_2019_web.pdf

distribution guidance, which would apply to add-on insurance sold through motor dealer intermediaries.¹⁰

The Productivity Commission's recently released Competition in the Australian Financial System report has backed ASIC's moves and have argued for the need to go further. Recommendation 15.1 states:

ASIC should proceed as soon as possible with its proposal to mandate a deferred sales model for all sales of add-on insurance by car dealerships.

The deferral period should be a minimum of 7 days from when the consumer applies for or purchases the primary product.

Following implementation, the Australian Government should establish a Treasury-led working group with the objective of comprehensively extending the deferred sales model to all other add-on insurance products, with the model set in legislation and ASIC empowered to offer exceptions on a case-by-case basis.

With no action on sales of junk add-on mobile phone/device insurance, the Communications sector is in danger of falling far behind other services sectors, government and community expectations if the new TCP Code does not include some action on the poor sales practices of such products.

Financial Rights strongly recommends that the new TCP Code include commitments to a deferred sales model for mobile phone or device insurance. We recommend that the communication sector follows the lead and get ahead of the Banking Sector and introduce a deferred sales period of 7 days for all mobile phone/device insurance, in store, over the phone and on the internet.

We also believe that Sales Representatives need to provide consumers will full information about alternatives to mobile phone insurance. If a consumer already has contents insurance that covers a communications device, or the consumer could simply add the device to the existing policy, these can be cost-effective options to purchasing stand-alone add-on insurance.

Recommendation

7. Clause 4.6.1 should be updated to explicitly refer to honesty as a quality to which the Sales Representatives must adhere.
8. An additional element should be added to clause 4.6 that the supplier must actively take account of customer circumstances and provide them with appropriate products and services, including lower/all cost options.

¹⁰ ICA, Review of the General Insurance Code of Practice, Final Report, June 2018
http://www.codeofpracticereview.com.au/assets/Final%20Report/250618_ICA%20Code%20Review_Final%20Report.pdf

9. With respect to the Supplier providing ongoing monitoring under clause 4.6.1(b) sales should be monitored to ensure sales are appropriate, as a general principle.
 10. Information and data relating to this monitoring needs to be reported to the Communications Alliance on an annual basis and published in some form.
 11. The TCP Code should expect Suppliers to establish a set of sales rules and maintain a framework to monitor compliance with these rules, including quality assurance measures for reviewing sales such as call monitoring, mystery shopping and post-sale call surveys; and analysis and reporting on key data, such as sales results, lapses and complaints.
 12. The phrase “and seek to increase” from clause 4.6.1(c) should be maintained.
 13. The TCP Code should explicitly prohibit pressure selling and other unacceptable sales practices should not be permitted.
 14. The new TCP Code include commitments to a deferred sales model for mobile phone or device insurance. We recommend that the communication sector follows the lead and get ahead of the Banking Sector and introduce a deferred sales period of 7 days for all mobile phone/device insurance, in store, over the phone and on the internet.
 15. Suppliers should commit to ensuring that Sales Representatives provide consumers will full information about alternatives to mobile phone insurance.
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Credit Assessment

Access to telecommunications services and devices are increasingly both an essential part of modern day life and a very expensive financial commitment. It is critical that consumers are not sold inappropriately expensive plans or deals, and that credit assessments are conducted in a genuine, sensitive and appropriate manner.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has recently exposed some of the incredibly poor, lax and even corrupt credit assessments banks are conducting. We believe that the telecommunications industry’s practices come close to matching some of these lax practices. Financial Rights regularly hear from consumers, particularly young consumers, who have signed up to mobile phone contracts that are wholly unsuitable for their financial circumstances and day to day needs. This has been a particular issue in Aboriginal communities.

Case study 1 –Greg’s story – C124294 – Inappropriate credit assessment, poor sales process, clear financial hardship rejected

Greg is a young 22 Aboriginal man with a history of stress disorder, depression and substance abuse from a life of childhood trauma. Greg lives in public housing, has no

employment prospects, has a mild disability and is living off his disability pension. Greg gets ongoing help from a youth and community services since 2012 and often relies on welfare assistance/charity for food.

In 2015, Greg applied for a phone and a speaker on contract at a Big Telco store. Greg told the representative that at the time he was earning a youth allowance of \$400 a fortnight, which the representative told him he could afford this.

Greg had serious difficulty with paying the contract and ended with a \$3100 debt with the Telco. Greg tried to get financial hardship and offered to make repayments of \$100 a fortnight. This was refused and Greg tried to ignore the debt. In February 2017, the debt was sold to a Big Debt Collector.

In 2017, Greg was called by the debt collectors threatening legal action. Greg sought assistance.

Financial Rights wrote to the debt collection agency and they agreed to no longer pursue the debt and would not on sell the debt to anyone else.

Case Study 2 - Aaron's story – C139267 - mobile phone debts

Aaron, a young Aboriginal man contacted Financial Rights after a he received a 'Notice of consideration of legal action' in relation to a phone debt. It turned out he had two phone debts:

1. Approx. \$8750 to a Telecommunications Company who had engaged a debt collector who had also engaged outside lawyers
2. Approx. \$3250 to a debt collector who had bought the debt from the Telecommunications Company.

The back story involved Aaron leaving home and moving interstate. He applied online for 2 mobile phones services within about a month of each other. Both were on plans; \$135 per month and \$60 per month. He hardly made any payments as he couldn't afford it. He lost his phone. He gave the other phone to his sister who pawned it.

Aaron is currently homeless and in transitional housing. He receives Youth Allowance. Financial Rights drew up a statement of financial position which showed he did not have capacity to make any payments.

We applied for a debt waiver and in the event waiver was declined, we asked for documents in relation to the Telecommunications Company's assessment/decision to approve the 2 phone services.

The Telecommunication's Company agreed to the following:

1. They would recall both debts, agreed that the debts will remain with the company with no further collection action.
2. The credit defaults will remain on Aaron's credit file as unpaid defaults.

Financial Rights have heard of multiple cases of Aboriginal youth with debts up to \$20,000 following sales from specific telecommunications outlets.

Australian Household Debt is also reaching some of the highest levels in the world according to the OECD.¹¹ Household debt is currently at 121.7% of GDP.¹² The ubiquity of post-paid mobile phone plans can only be contributing to this problem and the communications sector needs to take steps to address some of the problems. This requires communications companies undertaking more rigorous credit assessments.

To ensure that this happens actual requirements need to be placed upon sales representatives. With few requirements under the TCP Code to undertake a genuine and appropriate credit assessment, combined with a over-zealous sales culture, there is little incentive to make sure sales representatives are acting appropriately.

Financial Rights notes that while a Supplier must undertake a Credit Assessment before providing a Post Paid Service to a consumer and explain the financial implications (under clause 6.2) there is no actual requirement beyond this – simply a guidance as to what a Credit Assessment *may* include. This unfortunately allows too much leeway or wriggle room for a Supplier and/or Sales Representative to undertake the most minimal of checks, leading to poor outcomes for consumers.

If an appropriate credit assessment had taken place for Greg above, he would not have been caught in the situation he found himself in and a more appropriate mobile phone service should have been provided. As it is the Code does little to enforce any sort of minimum standard in credit assessments.

Financial Rights believes the TCP Code must be strengthened with minimum requirements introduced to ensure a realistic assessment of the affordability of the product for the consumer and their capacity to pay. We point to the responsible lending obligations under Chapter 3 of the *National Consumer Credit Protection Act 2009* and *RG 209: Credit Licensing - Responsible Lending Conduct* as a starting guide to improve the TCP Code namely:

1. making reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
2. taking reasonable steps to verify the consumer's financial situation; and
3. make an assessment about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

¹¹ <https://www.finder.com.au/australias-personal-debt-reported-as-highest-in-the-world>

¹² <https://tradingeconomics.com/australia/households-debt-to-gdp>

Financial Rights is not arguing for such strict credit assessment processes that it becomes in effect a barrier to access a telecommunications process. However we are arguing for some basic, mandatory standards and actions from communications companies to help avoid situations like Greg's and people from signing up to contracts that they simply could not ever afford. RG 209 provides a good guide because the basic obligations are scalable by nature – in other words the level of inquiries a Supplier would need to make depends on the circumstances.

We believe that for a Credit Assessment to be appropriately conducted at a minimum proof of income, credit check, payment history of the provider should be sought.

Financial Rights supports the addition of clause 6.2.1(a)

For an existing Customer who seeks to purchase additional device(s), sign up to multiple Post-Paid Services, or change plans to one with increased cost, a check of that Customer's payment history with the Supplier

Financial Rights also believes that in addition to a credit assessment there should be an obligation placed upon Suppliers and their Sales Representatives to conduct a suitability assessment to ensure that a consumer will gain the benefit from the plan.

Financial counsellors will from time to time speak with a caller who has taken out a contract for one or two phones for a partner, friend, or family relative who uses the phone, doesn't pay the bill and the original purchaser ends up stuck with the bill. Suppliers and their Sales Representatives should work with people taking out plans with more than one phone to clarify from the start of the contract, who will end up with the bill. There should be an ability to split the payments in such situations.

Recommendation

16. the TCP Code must be strengthened with minimum requirements introduced to ensure a realistic assessment of the affordability of the product for the consumer and their capacity to pay.

17. The Code should ensure that Suppliers and or their Sales Representatives must:

- a) make reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
- b) take reasonable steps to verify the consumer's financial situation; and
- c) make an assessment about whether the credit contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

18. Credit Assessment must include some standard, mandatory checks including proof of income, credit check, payment history check.

19. Financial Rights supports the addition of clause 6.2.1(a)

20. The TCP Code should oblige Suppliers and their Sales Representatives to conduct suitability assessment to ensure that a consumer who has purchased a plan with more than one phone, that the purchaser will gain the full benefit of the plan, and if not should act to ensure that billing or contracting arrangements are changed to reflect the reality of the intended use.

Definition of Small Business Consumer

Financial Rights notes the proliferating multiplicity of definitions of a small business across the economy and in Codes of Practice.

We note the following definitions are used that we are aware:

ASIC regulates:

'small proprietary companies', which means a co with two out of these three characteristics:

- *an annual revenue of less than \$25 million*
- *fewer than 50 employees at the end of the financial year, and*
- *consolidated gross assets of less than \$12.5 million at the end of the financial year.*

The Australian Tax Office defines a small business as one that has annual revenue turnover (excluding GST) of less than \$2 million.

Fair Work Australia defines a small business as one that has less than 15 employees.

The Australian Bureau of Statistics defines a small business as a business that employs fewer than 20 people.

The newly instituted and ASIC approved Banking Code of Practice¹³ includes the following definition of small business:

A business is a "small business" if at the time it obtains the banking service all of the following apply:

- a) it had an annual turnover of less than \$10 million in the previous financial year; and*
- b) it has fewer than 100 full-time equivalent employees; and*
- c) it has less than \$3 million total debt to all credit providers including:*
 - i. any undrawn amounts under existing loans;*
 - ii. any loan being applied for; and*
 - iii. the debt of all its related entities that are businesses.*

¹³ https://www.ausbanking.org.au/images/uploads/New_Banking_Code_for_Australia.pdf

This according to ASIC will cover “the considerable majority – between 92-97% – of businesses in Australia.”¹⁴

The newly established Australian Financial Complaints Authority (**AFCA**) will apply a definition of a small business as one with fewer than 100 employees. AFCA will also apply monetary limits or caps from accepting complaints – of up to \$5 million facility limits.

In contrast to the above definitions, the Australian Consumer Law applies to business where they “purchase goods or services that cost less than \$40,000.”

The definition of Small Business is therefore one based on their expenditure rather than the employer numbers or size of turnover.

The TCP Code follows this approach but at a much lower level by defining a small business as follows:

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:

- (i) does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and*
- (ii) has or will have an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than \$20,000.*

At a minimum the TCP Code should be inline with the Australian Consumer Law’s \$40,000 level.

Financial Rights however would also put forward a re-think of the definitional under the TCP Code to increase access to small businesses to the rights enjoyed by most consumers. The Communications Alliance should consider basing the definition on the number of employees or annual turnover rather than spending. Such a move would remove the subjective first part of the definition regarding a small business ability to negotiate the terms of the Consumer Contract. It is unclear how such a definition can be objectively demonstrated and seems like a significant hurdle to keep small business out of the protections afforded by the Code rather than one seeking to address genuine issues facing small business.

Recommendation

21. At a minimum the TCP Code should be inline with the Australian Consumer Law’s annual spend limit of \$40,000. Serious consideration should be given to changing the definition to one based on the number of employees or annual turnover rather than spending, to

¹⁴ 18-223MR ASIC approves the Banking Code of Practice, 31 July 2018, <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-223mr-asic-approves-the-banking-code-of-practice/>

ensure that the Code is more inclusive and addresses the needs and concerns of small business.

Financial Hardship

Financial counsellors at Financial Rights are hearing from increasing numbers of young people experiencing financial hardship and financial stress related to their mobile phones and other communications devices. This, as outlined above, is particularly the case in the Aboriginal and Torres Strait Islander communities: see case studies 1 and 2. Clearly, there are problems with telecommunication's company credit assessment processes as outlined in the section above.

But with respect to the handling of debt issues, we have also found Suppliers wanting.

Case Study 3 – Firas' story - C153069 – Poor handling of financial hardship; poor communications

Firas had a mobile phone plan with a Large Telecommunications Company. As he uses his mobile phone as his main line of contact including for international calls, Firas had a number of issues with the Large Telecommunications Company in relation to billing, services, and customer service. Firas ran into some financial difficulty and was in communications with the company about his financial hardship. Firas was an asylum seeker, had been in a detention centre, English wasn't his first language and he could barely write in English. He was receiving a Centrelink allowance prior to finding a casual job.

Firas settled his debt to the Large Telecommunications Company but later realised they had made a default listing on his credit report. Firas went to a Credit Repair Company to help with getting the default listing removed, however the Large Telecommunications Company incorrectly advised this Credit Repair Company that he had an outstanding debt due to them. Firas was then hassled by the Credit Repair Company to pay up the alleged outstanding amount, as well as for their fees.

Firas contacted Financial Rights, as he was feeling very stressed dealing with being chased for money. The matter was resolved however, we identified a number of issues:

The Large Telecommunications Company had several different departments for example "collections", "general", "debt administration" and "other", all of which did not appear to be communicating with one another and therefore there were discrepancies and mistakes in handling our client's file

The Large Telecommunications Company should have identified from an early stage that

our client was a more vulnerable client and in hardship

Firas had to make numerous calls to the Large Telecommunications Company to follow up on issues, all of which highlight how time consuming and difficult it is to resolve a problem, and that there appears to be a very poor customer service system in place

Financial counsellors note that people experiencing financial difficulty are often disadvantaged by the structure of the plans available and nature of the platforms. Plans are not just expensive but often designed to include high level of monthly call usage or data limits that are often unused and wasted and expire each month with no benefit to the consumer. The use of particular handsets and tablet platforms also lock consumers into luxury brands because they are concerned about difficulty of transferring contacts, photos and personal information.

Financial counsellors report that it is also very difficult to negotiate on behalf of consumers experiencing financial hardship the cancellation of their plans or bundled contracts because of large cancellation fees, cost of handsets and tablets.

Financial Rights notes that the draft TCP Code includes an amended definition of financial hardship and now includes a standalone chapter on financial hardship, there is however a lot of room to improve the Code as it applies to those in financial difficulty.

Financial Rights notes that the ABA has boosted the financial difficulty section in its new Banking Code which includes a number of commitments we feel would also provide helpful guidance for the telecommunications context.

Firstly, while the TCP Code states that a Supplier must provide details of a source at which a consumer can locate details of community financial counsellors (at clause 7.1.3) there is no actual commitment to working with that financial counsellor. The Banking Code states:

You can choose to have us deal with your financial counsellor or representative

162. If we are working with you to help you respond to financial difficulties, then you can tell us to deal with your financial counsellor or representative – rather than dealing with you. To do this, you will need to give us their contact details in writing.

163. However, if we have made reasonable attempts to contact, or deal with, your counsellor or representative but we are unsuccessful, then we will deal with you again.

A similar commitment should be made under the TCP Code.

Banks have committed to being more proactive in identifying financial difficulty. While they have a larger range of data points to help identify financial hardship, telecommunications companies also have a range of data points at their disposal to assist – including simply recognising regular or irregular late or default payments.

The Banking Code states:

We may contact you if we think you are experiencing difficulty

165. We will employ a range of practices that can identify common indicators of financial difficulty. If we identify that you may be experiencing difficulty paying what you owe under a

loan (or are experiencing financial difficulty), then we may contact you to discuss your situation and the options available to help you. We will do this on a case-by-case basis.

166. If we are able to contact you and discuss your situation under paragraph 165 and we offer basic bank accounts, and you are eligible, we will offer this product to you.

Again similar commitments could be made by telecommunications suppliers in this regard.

Telecommunications companies should also commit to actually working with the consumer on their financial difficulty. The language in the Code is currently such that the telecommunications companies are obliged to have information and a series of processes in place to consider financial hardship requests. There is no positive empathetic language in the Code to state that they will work with the consumer to resolve their issues.

Financial Rights financial counsellors report clients describing significant issues in their dealings with telecommunications companies in obtaining financial hardship arrangements appropriate to the consumer's needs. We note that telecommunications companies ranked poorly for hardship practices in the Rank the Telco report¹⁵ with a top score of 4/10, worse than rankings given to banking, other utilities and even debt collection industries.

The Banking Code includes the following:

We will work with you to help you respond to financial difficulty

167. With your co-operation, we will work with you to help you find a sustainable solution to your financial difficulties. Any help we can give will depend on your individual circumstances. We provide help to customers on a case-by-case basis.

The same should be included in the TCP Code.

Financial Rights supports the addition of wording at clause 7.4.1 to ensure that the Supplier must limit required documentation to that which is relevant to the Financial Hardship assessment and not unduly onerous.

Further we believe telecommunications companies need to make a commitment to improving the structure of plans to provide more basic, no frills services. Plans that allow the rolling over of call usage or data should be made more common. Telecommunications companies should also consider waiving cancellation fees for those experiencing financial difficulty.

Financial Counsellors note that many financial counselling and community agencies have access to Telstra's Billing Assistance Program. Participating community agencies are able to provide clients with a Telstra Bill Assistance Certificate of a fixed amount to pay towards their Telstra bill. Telstra funds the program and participating Community Agencies distribute the program on Telstra's behalf.

We believe that this is a positive program and Telstra should be recognised for its important contribution to assistance those in financial difficulty. We believe that all telecommunications companies should provide such a program. People in financial hardship play a lottery when falling on hard times – one that is wholly dependent on which telecommunications carrier they

¹⁵ <http://accan.org.au/files/Grants/Rank%20the%20Telco%20Report.pdf>

signed with. We would like to see the program extended to all telecommunications companies via the TCP Code.

Recommendation

22. The TCP Code should include a commitment from telecommunications companies to:

- a) work with consumers' financial counsellor or representative if they request.
- b) employ strategies to be more proactive in identifying financial difficulty of the customers and offer cheaper basic plans where appropriate ;
- c) commit to actually working with the consumer to find sustainable solutions to their financial difficulties;
- d) for those experiencing financial difficulty adding the following options to the list at clause 7.2.1(a):
 - i. Waiving cancellation fees
 - ii. Enabling the rolling over of unused call and data usage;
 - iii. Providing assistance to transfer contacts, photos and other personal information to different, cheaper handsets and tablets;

23. Financial Rights supports the addition of wording at clause 7.4.1 to ensure that the Supplier must limit required documentation to that which is relevant to the Financial Hardship assessment and not unduly onerous.

24. The TCP Code should commit all telecommunications to establish and maintain a program similar to Telstra's Billing Assistance Program.

Customer access to records

Financial Rights runs the Insurance Law Service and our solicitors regular hear from clients who have made a claim on an insurance product and have been requested by the insurer to provide mobile phone or communications device records to substantiate the claim or are subject to an investigation that requires the policyholder to provide mobile phone or communications device records. Callers regularly complain about the difficulties of obtaining these records from telecommunications companies. We have found that in some cases the only way to motivate the telecommunications company to provide the records is via a complaint to the TIO.

Case study 4 – Jacinto’s story - C141648 – Inability to obtain phone records

Jacinto was required to provide his mobile phone records to an insurance company to assist with their investigation into his insurance claim for his car which was stolen. Jacinto is a 51 year old Centrelink pensioner who was born overseas and whose first language is not English. He cannot write in English and has low to nil computer skills and for all intents and purposes cannot use a computer. Jacinto called the Insurance Law Service to assist with his claim. Financial Rights found it was incredibly difficult to obtain the phone records from the telecommunications company due to no recognisable department which dealt with the issue. When we did speak to somebody who sent a link to a webpage, the webpage required a “billing account number” that Jacinto was unable to provide as he did not have an account with the company any longer, was not able to obtain the number for held the information any longer. We advised the Company of this and received no response.

We also tried to contact the Large Telecommunications Company on the contacts provided on the Telecommunications Ombudsman website but our letters received no response. The Large Telecommunications Company finally responded to our request once a complaint with the Telecommunications Ombudsman was lodged.

Firas’ story below too demonstrates poor handling practices relating to records.

Access to records can be incredibly important, not just in the insurance investigation space. Many consumer may need this information for a number of legitimate purposes, including in instances where their phone is lost or stolen and require access to information about usage or important contact numbers that may have been lost.

The TCP Code is particularly vague with respect to the right of a consumer to access their records.

We note that there is a consumer has the right to access records regarding transfers for two years after a transfer under clause 9.8.

Clause 3.2.1 commits a Supplier to:

ensure that any information provided or made available to Consumers is clear, accurate, free of material omissions, relevant, current, readily accessible, and, in cases where information is provided, timely.

But this leaves the decision as to what information they make available – which can be limited-up to the Supplier.

There are rules relating to record keeping of interactions (under clause 4.9.1(d)) and spending management usage information (under clause 6.5.4). Despite these commitments, we have had great difficulty in establishing past agreements and interactions between their client and a provider due to not being given access to records.

Billing information should be provided under clause 5.2.5:

Billing information related to that Customer's or former Customer's Telecommunications Service (whether a Pre-Paid Service or a Post-Paid Service):

- a) for a period of up to six years prior to the date the information is requested;*
- b) in a format that is able to be read and understood;*
- c) through one medium free of charge for the period of up to 24 months prior to the date the Billing information request is received by the Supplier, noting that providing online or via email is considered to be free of charge;*
- d) for information requested which is older than 24 months and up to six years from the date the Customer request is received by the Supplier, the Supplier may impose a Charge for the provision of this information;*
- e) where requested, the Supplier must include Itemised details of all Charges associated with the Telecommunications Service; and*
- f) Customers may request provision of Billing information via other mediums and formats normally available from the Supplier (e.g. hardcopy bill re-prints) and subject to clause 5.2.6, the Supplier may impose a Charge for the provision of this information.*

However billing information and invoices are not necessarily an itemised log of every call and SMS made – records that are regularly requested by insurers of the consumer.

Clause 5.5 ensures that Suppliers provide information about itemized charges (clause 5.5.3), itemized timed call charges (clause 5.5.4) this is not necessarily all that is being required by insurers – including full call logs including the source, the destination, and the date, time and duration of a communication and SMSs. There are already legal requirements¹⁶ for telecommunications companies to assist Government agencies including law enforcement agencies by providing records of communications such as calls, SMSs and emails, including the source, the destination, and the date, time and duration of a communication.

Given this information is available to Government agencies and records must be kept, consumers (and their authorised representatives) should have greater rights to accessing their own call information and telecommunications companies should provide simple and easy access to these records.

We recommend that the TCP Code strengthen the ability of a consumer (or their Authorised Representative) to access their own mobile phone or communications device records. Consumers and their representatives should not have to be forced to go to the TIO to obtain their records.

Recommendation

¹⁶ *Telecommunications (Interception and Access) Act 1979 and Telecommunications (Interception and Access) Regulations*

25. . The TCP Code strengthen the ability of a consumer (or their Authorised Representative) to access their own mobile phone or communications device records including itemised accounts of call and SMS logs.

Notice to restrict, suspend or disconnect a service for Credit and/or Debt Management Reasons

Financial Rights notes ACCAN concerns with clause 6.8.1(a)(i). It states that:

A Supplier may only Restrict, Suspend, or Disconnect a Telecommunications Service for credit and/or debit management reasons without first informing the Customer if:

- (i) *the Supplier assesses that the Customer or the account status presents an unacceptably high credit risk to the Supplier;*

This is incredibly unfair and will lead to many people without access to what is now an essential service, further embedding their financial difficulties and creating a downward spiral for the consumer. We agree with ACCAN that this clause may be inconsistent with the unfair contract provisions of the ACL.

Financial Rights recommends the removal of this clause.

Recommendation

26. . Clause 6.8.1(a)(i) of the TCP Code should be removed..

Other issues

Financial Rights notes a number of recommendations by ACCAN with respect to:

- Auto data top ups
- Customer Service
- Training
- Accessibility
- Web Content Accessibility guidelines, and
- Transfers Critical Information Summaries

We wish to provide our support for these recommendations as sensible and appropriate changes to the TCP Code.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions regarding this submission please do not hesitate to contact Drew MacRae, Financial Rights Policy and Advocacy Officer on (02) 8204 1386 or on drew.macrae@financialrights.org.au.



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