

**COMMUNICATIONS  
ALLIANCE LTD**



**COMMUNICATIONS ALLIANCE SUBMISSION**

**DRAFT TELECOMMUNICATIONS (FINANCIAL  
HARDSHIP) INDUSTRY STANDARD 2024)**

24 NOVEMBER 2023

## **TABLE OF CONTENTS**

---

<b>1. INTRODUCTION</b>	<b>4</b>
<b>2. PART 1 - PRELIMINARY</b>	<b>5</b>
<b>3. PART 2 – FINANCIAL HARDSHIP POLICY</b>	<b>8</b>
<b>4. PART 3 – FINANCIAL HARDSHIP ASSISTANCE</b>	<b>9</b>
<b>5. PART 4 - CREDIT MANAGEMENT ACTION</b>	<b>12</b>
<b>6. PART 5 PROCESSES, TRAINING AND MONITORING</b>	<b>12</b>
<b>7. PART 6 – RECORD KEEPING</b>	<b>12</b>
<b>8. PART 8 – TRANSITIONAL ARRANGEMENTS</b>	<b>13</b>
<b>9. CONCLUSION</b>	<b>13</b>
<b>ATTACHMENT 1</b>	<b>14</b>

---

## **ABOUT COMMUNICATIONS ALLIANCE**

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

## **1. INTRODUCTION**

Communications Alliance Ltd and its members welcome the opportunity to contribute to the ACMA's consultation on ITS DRAFT Telecommunications (Financial Hardship) Industry Standard.

The financial hardship protections currently afforded by the Communications Alliance Telecommunications Consumer Protections (TCP) Code are core elements of its overall protection framework.

We accept that the Minister for Communications has directed the ACMA to make a standard in the financial hardship space. We are keen to work constructively with the ACMA to achieve an effective standard, which also meshes as seamlessly as possible with the existing and strengthened provisions being discussed as part of the TCP Code review and revision process.

There has been negative commentary from some stakeholders about what they have asserted is an unreasonably low number of Australian telecommunications customers currently within formal financial hardship assistance agreements with their CSPs.

Such commentary – deliberately or inadvertently – ignores the wide range of less formal assistance and flexibility options that CSPs currently offer to customers when those customers experience challenges in paying for the services they have chosen to purchase.

It should be clear that any expected actions required by the standard should reasonably balance the needs of a consumer and their ability to pay, against the CSP's right to be paid for services it provides and take reasonable and proportional action to prevent further debt accruing and to recoup monies owed.

It is important to recognise the need to avoid imposing a standard that might – due to cost, inflexibility or other factors, act to disincentivise the commendable commitment of CSPs to less formal forms of assistance, or, perhaps more critically, inadvertently cause harm to customers by forcing them to choose between no assistance or a formal scheme that will flag the customer as a financial risk when they attempt to apply for credit in the future.

Industry also observes that the Australian telecommunication market is diverse and highly competitive, with an estimated number of more than 400 service providers, offering a range of different services at differing price-points and levels of support and facility.

Barriers to changing providers are much lower for telecommunications customers than in many other industry sectors. The vast majority of service agreements today are monthly in nature. The days of excess data charges and so-called bill shock are almost entirely a thing of the past.

We therefore should not, when framing financial hardship assistance regulation, discount the fact that customers whose financial circumstances change, typically have a relatively easy path to a lower-cost plan with their current provider, or with an alternative provider.

One overarching observation is that industry finds the draft standard to be highly prescriptive – to the point where it risks bombarding and/or confusing customers and driving them away from the assistance process; whereas those same customers might be readily helped by the type of lighter-touch methods that many CSPs already use.

This submission comments on the areas where we believe the draft standard – and therefore the outcomes for consumers - could be improved through simplification and/or clarification.

We look forward to continuing engagement with the regulator in pursuit of the shared objectives that underlie both less formal and more formal financial hardship assistance.

## **2. PART 1 - Preliminary**

### **S2 – Commencement:**

Industry requests that the standard should commence no earlier than the date of the revised TCP Code coming into effect. This would create a complete co-regulatory/regulatory package in the consumer protections space.

Given that the standard might well create the need for IT/back-end/business practice changes among CSPs (and that we are rapidly approaching the 2023/24 IT lock-down period), this integrated timeframe would ideally provide sufficient time for changes to be made and make it easier to coherently communicate the new provisions to service providers and customers alike.

Industry also requests that the ACMA agree – as has happened after some previous revisions of the TCP Code - to create an initial period of performance monitoring but not enforcement, as CSPs adjust to implement the new provisions.

### **S5 – Definitions**

#### **consumer:**

Industry is concerned that the standard as currently drafted applies to large enterprise consumers and not-for-profit entities (and potentially government although we don't think this is the intention) who do not require the benefit of these types of consumer protections. Industry observes that the draft standard is written with a focus on residential consumers and as such, if it were to remain unchanged and apply to the enterprise customer cohort, it would require material amendments to enable operationalisation in this context for no consumer benefit, some of which we call out below. This cohort of customers is sophisticated, often have complex product holdings, transact at an entity-to-entity level with internal processes that may not align with some of the proposed concepts in the standard (e.g. billing/payment cycles) and have service and sales models that are more tailored than 'mass market' residential consumer models. To alleviate what industry believes is the unintended consequence of this customer segment being subject to the standard we proposed the following.

Sub-paragraph c should include the word "small" before the word "business". The definition of what constitutes a small business is proving to be problematic in the context of the TCP Code revision itself, as well as in this draft standard and also in relation to the scope of the potential definitive CSP register, being explored by the ACMA.

Please see the position paper at Attachment A, for examples of the ways in which setting an annual telecommunications spend of \$100,000 as the upper threshold for businesses to be considered "small" can result in large and/or multinational businesses – not intended to be covered by the standard – to fall into its scope. (Please note that the suggested definition in the attachment is superseded by the proposed definition in this submission)

We would imagine, for example – that an organisation such as Communications Alliance would fit the description of a small business (albeit a not-for-profit entity). We have nine employees, revenues of between \$2 million and \$3 million, and a reasonably comprehensive suite of communications services. Yet our telecommunications spend is less than \$20,00 and will soon fall further as – like many other businesses – we retire our land-line voice services.

Industry recommends that, for the purposes of the standard, the existing annual spend upper threshold be maintained at \$40,000 – consistent with a range of current instruments such as the existing provisions of the TCP code, the Telecommunications (Consumer Complaints Handling) Industry Standard 2018, the Telecommunications Service Provider (Customer Identity Authentication) Determination 2022, etc.

The definition of an in-scope non-profit organisation should also include the same spend and opportunity to negotiate threshold consistent with the existing provisions of the TCP Code. There are large nation-wide non-profit organisations who have significant spend and bespoke contractual arrangements.

The definition of consumer is also inconsistent with the expectations relating to financial hardship where the examples provided predominantly relate only to residential consumers.

Industry also recommends that ACMA apply the existing exclusion of account managed and integrated customers accepted under the Customer ID Authentication Determination in the standard. This will ensure that this cohort of customers who have previously been recognised by ACMA as not requiring the protections under the Determination due to their size, sophistication and transacting and servicing methods are excluded from consumer protections that are unnecessary for entities of this type. This exclusion recognises that account managed consumers and integrated consumers acquire more complex products and services reflective of their entity's operations, are capable of making informed buying decisions, of managing their own financial position effectively, are transacting at an entity-to-entity level and do not require consumer protections.

In conclusion the definition should read:

**consumer** means:

- (a) an individual who acquires or may acquire a telecommunications product for the primary purpose of personal or domestic use and not for resale; or
- (b) a business or non-profit organisation which acquires or may acquire one or more telecommunications products which are not for resale and which, at the time it enters into the consumer contract:
  - (i) does not have a genuine and reasonable opportunity to negotiate the terms of the consumer contract; and
  - (ii) has or will have an annual spend with the provider which is, or is estimated on reasonable grounds by the provider to be, no greater than \$40,000, but excluding any business or non-profit organisation which:
    - (1) is an account managed customer or integrated customer (as both these terms are defined in the Telecommunications Service Provider (Customer Identity Authentication) Determination 2022); or
    - (2) is a business organisation assessed on reasonable grounds by the provider to not be a small business.

Below are some additional suggestions re definitions

**Account managed customer** means a consumer of a carriage service provider where the provider assigns one or more of its employees or agents to be a designated contact person for the consumer, in relation to all matters relating to the consumer's telecommunications services.

**Integrated customer** means a consumer who:

- (a) uses an integrated service desk provided by the consumer's carriage service provider; or
- (b) has a business-to-business service request system with a carriage service provider.

### **Financial hardship**

Industry has a number of concerns with this proposed definition.

First, the broad swathe of factors cited in sub-paragraph (a) (i through ix) as noted previously are demonstrably residential-consumer-related; making the proposed definition inconsistent with the proposed definition of **consumer**,

Other concerns include that:

- there is apparently no avenue for objective assessment that the customer is unable to discharge their financial obligations, nor for a customer's belief that will be unable to discharge their obligations in the future;
- the potential provision of financial hardship assistance to be provided on an "ongoing basis" – i.e. potentially creating a scenario whereby a CSP could be expected to provide loss-making services on a permanent basis;
- sub-paragraph (a)(iii) would be better incorporated into(vi)
- sub-paragraph (viii) should specify that what is contemplated is an "unexpected" change in personal or family circumstances – i.e It should also include reference to 'substantial' unexpected change.
- If the definition is intended to apply to small businesses, there should be carve-out , for example, for financial difficulties caused by corporate maladministration, malfeasance or fraud mean that the customer is not automatically entitled to financial hardship assistance.
- It would be a perverse outcome if a small business CSP was required to support a business that may be in a better financial position than that of the CSP itself and where the CSP was driven out of business by this regulation.

### **telecommunications goods**

As part of the current revision of the TCP code industry is proposing to update this definition to: Telecommunications goods means any items supplied by a CSP for use in connection with a telecommunications service. Telecommunications goods may be supplied together with the telecommunications service, or separately." We suggest that the standard also use this formulation, in the interests of accuracy and consistency.

### **telecommunications service**

As part of the current revision of the TCP code industry is proposing to update this definition to;

A listed carriage service provided by a CSP; orAny service or content service provided by a CSP in relation to a listed carriage service (excluding subscription broadcasting or television narrowcasting services.)"

We suggest that the standard also use this formulation, in the interests of accuracy and consistency.

### **3. Part 2 – Financial Hardship Policy**

#### **S7 Establish comply with and review financial hardship policy**

In relation to sub-section (2), it should be noted, for clarity, that the 'equivalent' to the CEO, in the case of diversified companies, such as supermarket chains that also resell mobile services, will typically be the head of the telecommunications business unit, rather than the CEO of the overall company.

#### **S8 Minimum requirements – accessibility and promotion**

We believe that the 'point' of this section is to ensure that providers have a legible and fair policy and make it available to relevant customers. As such, we suggest that such additional detail as may be required be placed in the explanatory memorandum, rather than in the standard itself.

It would also be desirable that any requirements flowing from sub-paragraph 1 (f), relating to translation/language issues, be consistent with the related provisions of the revised TCP Code.

#### **S9 – Minimum content requirements - general**

Regarding sub-paragraph 9c, it is worth noting that telecommunications has not been declared to be an essential service. This is a term of convenience that some stakeholders have begun using in recent years, but this status has not been formalised and do not apply to all aspects of every telecommunications service.

Telecommunications services are diverse and evolving. Indeed, for example, while some CSPs provide the sole source of connection an individual has beyond their home, others focus on providing marketing-relating capabilities to businesses of all sizes (including small businesses) as B2B services. To say the term 'essential service' applies to all scenarios and types of telecommunications services equally doesn't reflect the operational reality nor the community's expectations.

While marketing capabilities, for example, are commercially useful services, they would not typically qualify as "essential". Similarly, some telecommunications services to residential customers are principally entertainment-related – worthy, but not "essential".

What is essential to Australian residential and small business customers is connectivity. In this context it is important that the terminology used in the standard is appropriately targeted to where it will have the intended and appropriate outcome for consumers. Financial hardship assistance typically focuses on preserving connectivity where there are fair commercial terms for doing so.

Additionally, the term "essential services" carries legislative implications in other legislation, such as the NSW Essential Services Act 1988. Describing telecommunication services as "essential" in the standard would cause significant uncertainty in Australia's overall legal framework that governs truly essential services. For a service to be designated an essential service in Australia's context, a proper process of public consultation and impact analysis needs to be carried out. It would not be appropriate for telecommunication services to be designated as "essential services" through what is essentially a backdoor approach, by compelling CSPs to make public statements that their services are "essential".

Relating to this, we are of the view that the statement described in section 9(c)(i) is wholly unnecessary, as the substantive and operative obligations for CSPs to meet with respect to financial hardship of consumers are contained in the rest of the standard.

We accordingly recommend removing section 9(c)(i) in its entirety from the standard.

We suggest that reference to a 'phone number' in subclause (f) be removed and the requirement be reframed around the need to provide at least one contact point that allows 'real time' communication with a 'real person'. We note that the CHS currently requires a phone number, but

that that instrument was drafted in 2019 and the TIO appears willing to revise it to allow more a more outcomes-focussed approach in relation to this point. A similar approach is being proposed for the TCP Code and appeared to get broad support from the TCP Code Review Committee.

#### **S10 – Minimum content requirements – applications**

Sub-paragraph 10(a) requires CSPs to allow customers to make an application for financial hardship assistance using “all contact methods that the provider ordinarily makes available to its customers to contact the provider.”

This is not appropriate. There may be contact channels that are not appropriate for the communication required to initiate a new financial hardship arrangement – for example via a chat-bot, other Artificial Intelligence channel or via an over-the-top application such as WhatsApp. CSPs need to ensure that channels used for this type of communication are appropriately available and secure to avoid fraudulent use and a pathway for those that commit fraud accessing sensitive customer data.

The requirement here ought to be that the provider can re-direct a customer using any contact to the channel that is suitable for seeking assistance and which suits the customer’s needs whilst ensuring the necessary data protections.

#### **S11 Minimum content requirements – assessment of applications**

Sub-paragraph (a) should include a caveat to the effect that it does not apply where supporting materials are required to meet anti-fraud, legal or regulatory obligations – e.g., a statutory declaration or a letter from a support service. This amendment would also be consistent with what is being proposed in relation to the inclusion of domestic and family violence (DFV) enforceable protections in the revised TCP Code.

Under sub-paragraph (g) it should be recognised that:

- Multi-step processes often will be required – e.g., the MFA processes mandated by the ACMA as part of its customer authentication service provider determination;
- Circumstances differ between residential and small business customers. In the case of the latter, contractual arrangements will typically necessitate multiple stages to the communication and agreement process.

#### **S13 Minimum Content financial hardship policy summary**

This sub-paragraph manages to be both unduly prescriptive and ambiguous.

Does the 12-point Times New Roman-equivalent requirement apply here, or not?

It is unrealistic to expect that all the specified data can be captured on a single page, if that page is A4 (which is not specified). CSPs could be tempted to ask whether they can communicate it on an A3 or A2 page.

A more flexible, outcomes-based requirement would be more appropriate. We would be happy to draft some alternative words, if that would be helpful to the ACMA.

## **4. Part 3 – Financial Hardship Assistance**

#### **S14 Minimum requirements – Identifying financial hardship customers**

The requirement to take “all reasonable steps” necessary to identify financial customers as early as possible is vague and subjective when placed in an enforceable instrument in an area of human activity that is complex, sensitive and widely variable.

The obligations make an incorrect supposition that chronic late payment is symptomatic of financial hardship when for many customers this is typical payment history and has no bearing on ability to pay.

It also raises daunting challenges as to how to train staff to be able to pick up on nuances and subtle cues from customers who often do not want to be identified as being in “financial hardship”, but are nonetheless seeking some help from their provider. At a minimum, in the last line of sub-paragraph (b), the words “flexible payment options or” should be inserted before the words “financial hardship assistance”.

It would also be helpful to clarify that such ‘writing to customers’ could be in the form of information being included on the bill.

#### **S15 Minimum requirements – communicating with customers**

In paragraph 1 and in paragraph 2, we suggest replacing the words “indicates” with the word “advises”.

In sub-paragraph c it should be noted that not every contact channel used for initiating financial hardship assistance will there necessarily be an ‘application form’ used. The outcome-based approach should be that the customer should know what their options are for seeking assistance under the range of channel options offered by the provider.

In sub-paragraph 2(a) the word “had” should be deleted, for clarity and the word “currently” inserted before the word “have”.

In paragraph 3, our previous comment regarding the fact that not all channels will necessarily involve an ‘application form’ should be taken into account. Rather, there should be access to a contact channel that is suitable to the needs of the customer whilst maintaining security for any information provided.

#### **S16 Minimum requirements – assessing eligibility**

We do not have a difficulty with the general premise this section, provided that our comments regarding the definition of **financial hardship** are addressed.

However, we do not agree with the level of prescription in sub-paragraph 4(a), because these matters are often dealt with by various members of a dedicated team, who have access to the case details and can equally ably contact the customer as the process progresses. This approach also works effectively in many other industries e.g., superannuation and banking. The important thing is to ensure that the customer knows how to contact the team – not that they have a specific name, email address and telephone number of an individual officer as individuals handling a matter can change.

Similarly, in sub-paragraph (b), the word “including”, should be replaced with “which may include”.

#### **S17 Minimum requirements – timing for assessments and advice on outcomes**

The requirement for a maximum of a 5 business day conclusion is usually achievable for residential customers – but this could change if we see, for example, four more increases in the RBA’s cash rate and CSPs find themselves flooded with many additional financial hardship assessment requests, not of their own making.

The 5 business day requirement is also not realistic if the customer is in a remote location and chooses to use terrestrial mail services as their channel of communication.

There should be some greater flexibility inserted into this provision to allow for both for volumetric increases in number of requests for formal hardship arrangements and the different types of consumer, recognising that residential customers and not for profit/business customers applications for formal hardship arrangements will require different information and different checks.

As often, in the case of business customers, that will likely require internal approvals for communications or the need to fulfil other contractual requirements in order to furnish information required for completion of an assessment.

A better approach would be to have SLA's such as those for number portability that require a set percentage of applications to be completed within a set time and measured over a quarter.

For example,

- For a residential customer, once all requested information has been provided to the CSP:
  - o 90% of applications assessed within 5 business days; and
  - o 10% of applications assessed within 10 business days
- For business/not for profit customers, once all requested information has been provided to the CSP:
  - o 90% within 7 business days; and
  - o 10% within 15 business days

### **S18 Minimum requirements – options for financial assistance**

The drafting in this section is somewhat 'messy' and challenging to follow,

Also, the "three options" requirement in sub-paragraph (b) should be amended in circumstances where a bill waiver is offered. In that case, there is no need for other options. Perhaps the clause should state that two options should be on offer, or a bill waiver.

### **S20 Minimum requirements – communicating arrangements**

This needs to add an additional item before existing (d) stating that failure to adhere to the terms of the agreement may/will result in termination of the service.

The requirement that assistance should commence "as soon as" the customer indicates agreement to the arrangement is unduly prescriptive.

Residential customers might want to agree to a commencement date soon after they have indicated agreement, if that better suits their income cycle. Small business customers are very likely to agree a commencement date, for a range of reason. A more flexible form of words should be used that allows for the assistance to commence on a date agreed between the customer and their CSP.

### **S22 Review of arrangements for financial hardship assistance**

Paragraph 2 is unreasonable, because it creates the potential for an endlessly recurring 'loop', whereby a customer decides to consistently fail to comply with an agreed financial hardship assistance agreement. On each of these occasions, the CSP would be obliged to contact the customer and offer to review the arrangement.

This is an invitation for abuse of arrangements. Appropriate limits on non-compliance should be put in place to prevent the potential for such behaviour.

Suggest reword to:

- (2) Where a provider considers that a customer has not complied with an agreed term of an arrangement for financial hardship assistance, the provider must promptly contact the customer to advise them of the result of this breach of an agreed term and any available options, including whether this will result in service termination and any credit management action.

## 5. Part 4 - Credit Management Action

### S23 Minimum requirements – assessing credit management action

The requirement under sub-paragraph (2)(a) to “take all reasonable steps to keep the customer’s telecommunications service connected” is vague and undefined, potentially leaving CSPs subject to enforcement action, depending on what might be a subjective judgment by the regulator. This should be amended to provide greater clarity.

We Suggest:

- (b) take all reasonable steps to keep the customer's telecommunications service connected, whilst recognising the importance of maintaining connectivity and the commercial nature of the service.

### S24 Minimum requirements – taking credit management action

Under sub-paragraph (1) (a), there is no apparent limit on the length of time that a customer can deem themselves to be “discussing options” – leaving the door open to abuse of the framework if a customer refuses to pay for services indefinitely on the grounds that they assert they are still in the processing of discussing options. This should be amended to provide greater clarity.

Modify (b):

if the provider has a current arrangement for financial hardship assistance in place with the customer and the customer is meeting the terms of that arrangement.

Add new (2) (a) the customer has not agreed to a financial hardship arrangement within 10 business days after the CSP has provided details of the arrangement to the customer; or  
New (2) (b) The customer has declined the financial hardship arrangement; or

## 6. Part 5 Processes, training and monitoring

### S27 Training for personnel

It is unclear to us why, under paragraph 2, existing staff are allowed 3 months after the commencement of the standard to be trained in its complexities and obligations, whereas new staff need to be fully trained in the detail, complexities and obligations of the standard before they are able to interact with customers. These staff generally work in team environments – supervised, mentored, able to rely on the experience of their managers in real time. The differentiation should be removed.

Additionally, it should be noted that in diversified companies, such as supermarket chain that resell mobile services, it may not be appropriate to place onerous training obligations on all customer-facing staff, but rather on those staff who work, for example, in the relevant business unit or ‘customer hub’.

## 7. Part 6 – Record Keeping

This part should specify that the fairly onerous requirements apply to formal financial hardship agreements, and not to the less formal flexible payment and other assistance frameworks that CSPs also make heavy use of today, to meet their customers' needs.

### **S31 Privacy**

This should be removed as it seems to be jurisdiction creep and a matter that is either in the Privacy Act or if not, there is good reason why not. Complaint Handling is already covered in the Telecommunications (Consumer Complaints Handling) Industry Standard 2018. Perhaps it would be useful to point out here, for clarity, that all providers already covered by the Privacy Act are already required to meet these requirements.

## **8. Part 8 – Transitional Arrangements**

In order to give guidance on the arrangements at the time of transition a preferable approach would be to simply clarify what arrangements should be in place.

### **S33 and 34**

Agree these are useful for clarity, but need to change their order, 35 should be 33 and vice versa. Ex 35 to be 33 and should read:

(ex 35) 33 Arrangements for financial hardship assistance

- (1) If:
  - (a) a provider has entered into an arrangement with a customer for financial hardship assistance before the commencement day (the **original arrangement**); and
  - (b) immediately before the commencement day, the original arrangement remains in place.

Then s34 followed by current s33 (Complaints) renumbered to be s35

### **S35 Arrangements for financial hardship assistance**

We are concerned that the requirements under sub-paragraphs (c) and (d) of this section will be, on balance, counter-productive.

It should be remembered that this is a period in which CSPs will be battling to meet the many other requirements of the standard, be it IT or business process changes, staff training, or other issues.

To expect them to simultaneously reach out and deal individually with every customer already in a financial hardship Arrangement, review that arrangement, potentially amend it etc., is an operationally naïve and unreasonable request.

Worse – such a requirement also holds the potential to confuse customers as to why they are subject to review of their assistance arrangements. What if it is a customer has been in a hardship assistance agreement that is due to end a week after the commencement of the standard?

We see no merit in the transition arrangements proposal of the draft standard.

## **9. Conclusion**

This is demonstrably a complex area to cover comprehensively via any form of regulation, We trust that the thoughts and suggestions herein will be useful and look forward to the opportunity to remain engaged in the development process of the standard.

# ATTACHMENT 1

## Issues Paper: Scope and Application of TCP Code<sup>1</sup>

Note for the RC:

This is an update to the Issues Paper: Scope and Application of the TCP Code which was provided to the Review Committee (RC) prior to RC#2 and discussed both at that meeting and RC#3. It also encompasses RC Action 3.3.

This paper:

- briefly outlines the problem as originally identified,
- documents further discussions (at RC#2 and 3),
- provides detail about the financial impost of this issue not being adequately resolved, and
- proposes a new, more streamlined definition designed to address all stakeholders' concerns.

*This issue is also relevant to the FH Standard.*

### Identified problem

As currently drafted, the TCP Code provides protections for 'consumers'. The definition of 'consumers' is:

- a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or
- b) 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 \$40,000.

The ACCC and other members of the RC have suggested that the definition of consumer in the TCP Code (and FH Standard) should be updated to align with the updated definition of consumer in the ACL – that is, it should reference a \$100,000 spend.

Industry has raised concern that the current definition already unintentionally captures many medium/large enterprise and businesses, including the local operations of multinational corporations, that do not need the Code's protections. Increasing the spend threshold within an already problematic definition would substantially increase the number of large enterprises that would be unintentionally and unnecessarily captured by the Code.

The DC initially proposed, therefore, that the current spend threshold be retained, with the definition to be amended to more effectively exclude larger businesses through the inclusion of a number of 'carve-outs'. The proposed carve-outs were based on definitions of small business in general use, including that used by the TIO, ACMA (in the Customer ID Determination, registered in 2022), Australian Bureau of Statistics, and others). [\(Note: further details were provided in the original issues paper; they have been excluded here for brevity.\)](#)

---

<sup>1</sup> Note: Issues may be covered across a number of papers. All elements of the draft package are to be considered as a whole - please read and refer to Package overview and explanation.

## RC discussions

### **Intent is agreed: TCP Code protections should be provided for residential and genuinely small business customers.**

It is clear from RC discussions that all stakeholders agree that the TCP Code (and FH Standard) protections are intended for residential and genuinely small businesses customers.

No one is suggesting that the TCP Code provisions should apply to large businesses.

(The Department confirmed that this is the intent of the FH Standard too, in discussions about the Direction.)

However, the following issues about the proposed definitional changes were raised by RC members:

- concern that carve-outs will unintentionally prevent a genuinely small business from enjoying TCP Code protections. ACCAN in particular, contends that it is therefore better to keep the scope very broad, arguing that the cost of large businesses being unintentionally and needlessly captured in scope is likely to be minimal and is, on balance, justified and reasonable.
- concern that the new proposed definition was too long and complicated.

The ACMA has indicated that it recognises that the ACL has economy-wide application, and this is a telco-specific instrument, so carve outs that appropriately exclude large businesses and enterprises customers may be appropriate.

The challenge remains to agree on a definition that:

- provides protections for the intended customers (residential and genuinely small business customers), while excluding large enterprises and multinational corporations.
- where possible, uses definitions that are consistent with other telco legislation/ regulations and their approach – including the Financial Hardship Standard (noting that the draft was released during this process).
- is not unduly complicated.

### Further information, revised definition

Having considered the RC discussions further, the DC is pleased to:

- (a) provide further information to assist RC members around:
  - i. why many large businesses are not excluded from scope currently, despite there not being a power imbalance between them and the CSP (that is, they have the power and resources to negotiate terms and conditions, OR, if they did not have the need or opportunity to negotiate concerns, to address any dispute with the CSP),
  - ii. the cost imposed to CSPs in these businesses not being appropriately excluded, and
  - iii. the practical implications of attempting to ensure TCP Code compliance when many TCP Code requirements do not or cannot apply and do not make sense for these organisations, and cannot therefore be operationalised.
- (b) propose an alternative, simpler definition that it believes reasonably addresses the issues and concerns raised by all stakeholders.

### **Large business customers currently excluded from scope**

Many business and enterprise customers are currently excluded from the Code because they tend to employ in-house lawyers and have a genuine opportunity to negotiate the terms of their contract.

These organisations:

- tend to be purchasing non-mass market offerings that are complex, with many options (services, vendor equipment, vendor licences, etc), often bespoke.
- are managed by separate business units, with separate platforms, different databases and different sales teams than those servicing residential and small business customers.
- usually interact with their CSP (e.g. for service or billing queries) through specialised business portals.
- are provided with detailed technical specifications rather than a CIS.

These customers are, appropriately, excluded from current Code provisions and there is no suggestion from any stakeholder that this should change.

### **Large businesses currently in scope**

Many large business customers are currently in scope for TCP Code protections, despite being managed in a manner similar to that described above (on separate platforms, using sophisticated or complex services and engaging with their CSP via a business portal and having an account manager).

This occurs when they do not have many services with the CSP, spend less than \$40,000 with the CSP and are on standard contracts which do not provide them with a genuine opportunity to negotiate. This can happen for a number of reasons. For example, multi-national company X, may wish to use a back-up product from CSP A, to complement the suite of telco products it buys from CSP B. As a basic backup, the product bought from CSP A falls under the \$40,000 threshold. Under current rules, CSP A must provide TCP Code protections for this product, whereas CSP B, with whom company X spends \$90,000, does not.

Or, company X may wish to use a particular product offered by CSP C that is available to residential and small businesses consumers. Company X already has a suite of enterprise products from CSP C, which are not subject to TCP Code protections. However, because CSP C is not offering company X the ability to negotiate on this particular product, and the spend on this product is small, under the current Code, the TCP Code protections most likely apply. As company X is already account managed, the new product is added to that system. Unlike the systems and processes associated with the product when sold (as intended) for small businesses and residential consumers, the account managed systems and processes are not set up to comply with the TCP Code. This means a whole new compliance structure must be set up for these customers.

Both these scenarios create a situation where CSPs must spend substantial sums of money to provide TCP Code protections for a company that does not need them and where they are not meaningful – as many Code provisions do not apply/ do not make sense in this context and cannot be operationalised (more detail below).

Clearly, the number of large businesses in scope would increase substantially if the spend threshold were raised to \$100,000, as a number of submitters propose.

On this point, the Drafting Committee (DC) notes that the ACL spend threshold was increased in 2021 from \$40,000 to \$100,000 following the ACL review<sup>2</sup>. The ACL review's final report found that the \$40,000 spend threshold had not increased since 1986 and many business purchases that once were covered were no longer covered as a result of inflation. The final report noted specific examples of items that were once covered under the ACL but were not any more, such as client record systems, certain farm equipment, air-conditioning units for industrial buildings, water tanks and some vehicle purchases<sup>3</sup>.

---

<sup>2</sup> Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020.

<sup>3</sup> Australian Consumer Law Review – Final Report, March 2017, p. 73.

It was intended that by increasing the threshold it would ensure small businesses had consumer protection remedies available if such large value goods were faulty to minimise lost productivity<sup>4</sup>. It's clear the increase in the ACL business spend threshold was specifically targeted at large value business purchases acquired occasionally by otherwise small businesses.

The DC considers there are good reasons not to adopt this same approach in the TCP Code given the different nature of telecommunications goods and services and the TCP Code.

It is important to remember that the ACL is an economy-wide law and the monetary threshold has been set taking into account broader economy-wide considerations. At the time of the ACL Review, ABS CPI data shows that general prices had increased around 166 per cent since the \$40,000 threshold had been implemented in 1986<sup>5</sup> and it is apparent why high value business purchases like farm equipment would therefore no longer come under the \$40,000 threshold due to this inflation.

However, telecommunications goods and services are typically not high value business goods or equipment purchased occasionally. \$40,000 is a significant annual spend on telecommunications equipment and services.

Nor has there been a significant increase in prices of telecommunications goods and services as a result of inflation. Since 1986 telecommunications equipment and services have only increased 8 per cent. Indeed, since the \$40,000 threshold was introduced into the TCP Code 3 years ago (2020), prices for telecommunications equipment and services have decreased by 1 per cent<sup>6</sup>.

Therefore, it is extremely unlikely that small businesses once covered by the TCP Code may no longer be covered due to inflation in telecommunications prices. As such, there is no identified need to increase the threshold and increasing the monetary threshold to \$100,000 simply increases complexity for CSPs as it would expand TCP Code obligations to businesses that previously have not been subject to the TCP Code.

It is also important to note that keeping the TCP Code threshold at \$40,000 would not affect a CSP's obligations under the ACL, for example, in relation to misleading and deceptive conduct, and the consumer guarantees and warranties. Businesses would still have those essential ACL protections related to the acquisition of telecommunications goods and services.

### ***Costs imposed to CSPs in large businesses not being appropriately excluded***

Contrary to some stakeholders' belief that because the protections will never be required, there is no cost to business in their inclusion in scope, there are substantial costs incurred to their inclusion – estimated to be in the \$millions – with no benefit. The cost imposed of their inclusion in the Code's scope may result in some CSPs exiting this segment of the market.

The systems that CSPs use to support enterprise customers are quite separate and not set up to support TCP compliance.

For example, CSPs would not be able to provide 'essential information<sup>7</sup>' or a CIS to an enterprise customer that is contracting to purchase bespoke, complex products and services. Many other TCP Code requirements in relation to disconnection, vulnerable customers, etc, would also not be relevant in the situation and would not be able to be operationalised.

Additionally, all staff working on enterprise accounts would require training (and refreshers) on all aspects of the TCP Code, and new systems and processes would need to be implemented to

---

<sup>4</sup> Australian Consumer Law Review – Final Report, March 2017, p. 73.

<sup>5</sup> 6401.0 Consumer Price Index, Australia, TABLE 8. CPI: Analytical Series, Weighted Average of Eight Capital Cities.

<sup>6</sup> 6401.0 Consumer Price Index, Australia, TABLE 13. CPI: Group, Expenditure Class and Selected Analytical Series Index Numbers, Seasonally adjusted, Weighted Average of Eight Capital Cities.

<sup>7</sup> Refer to the separate Position Paper 'Essential Information' for information on this concept.

monitor compliance to it (despite some sections not being applicable to business customers). This represents a significant cost, with no consumer benefit.

**Originally proposed definition – Option 1**

The initial proposal was to include the following definition.

Application – this Code applies to Consumers where Consumer means:

- (a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or
- (b) 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. 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 \$40,000; and/or
  - ii. does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and/or
  - iii. is covered by a Standard Form of Agreement; and/or
  - iv. is not an account managed or integrated customer (as per Customer ID Determination); and/or
  - v. has a turnover under \$3,000,000; and/or
  - vi. employs fewer than 20 full time employees, including casual employees that work on a systemic basis; and/or
  - vii. has fewer than 50 services on their account; and/or
  - viii. is not a multi-national corporation.

A number of alternative proposals are outlined below.

**Revised proposed definition – Option 2** (fewer carve outs, but still relying on the definition in totality)

Application – this Code applies to Consumers where Consumer means:

- (a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or
- (c) a small business or a 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. 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 \$40,000; and/or
  - ii. does not have a genuine and reasonable opportunity to negotiate the terms of the Customer Contract; and/or
  - iii. is not an account managed or integrated customer (as per Customer ID Determination); and/or
  - iv. has fewer than 50 services services on their account; and/or

- v. has a turnover under \$3,000,000, or fewer than 20 full time employees.

**Revised proposed definition – Option 3a** (carve-outs consistent with the ID Determination, but with a 'reasonably assessment' *ex-post* approach)

Application – this Code applies to Consumers where Consumer means:

- a) an individual who acquires or may acquire a Telecommunications Product for the primary purpose of personal or domestic use and not for resale; or
- b) a **small business** or a non-profit organisation which acquires or may acquire one or more Telecommunications Products which are not for resale, and at the time they enter into the Customer Contract:
- i) has or will have an annual spend with the CSP, an annual spend with the Supplier which is, or is estimated on reasonable grounds by the Supplier to be, no greater than \$40,000; or
- ii) does not have a genuine and reasonable opportunity to negotiate the terms and conditions of the customer contract; or
- iii) is not an account managed or integrated customer (as per *Customer ID Determination*); or
- iv) is otherwise reasonably assessed to be a small business.

**Guidance – reasonably assessed to be a small business**

TCP Code protections are intended to provide additional protections for residential and genuinely small business customers – sole traders, 'mum and dad' businesses, etc – while excluding large enterprises and multinational corporations.

There may be other reasonable mechanisms that a CSP can use to determine if a business is in scope (or not) in addition to those listed at (i) to (iii). This might include, for example,

- organisations that have over 50 services on their account
- Number of employees or turnover.....
- Enterprise grade products
- other examples from option 1.

...include the concept of an *ex-post*/ risk-based approach. If a business customer is out of scope (i.e. the CSP is confident that it is not a residential or genuinely small business), yet (i), (ii) and (iii) do not apply, the CSP must document the basis of its decision so that it can demonstrate that the business is 'reasonably assessed' not to be a small business.

Should the ACMA have any concerns, it would ask for documentation.

Provides a transparent process for reasonably ensuring that the code (and FH Std?) appropriately protects those that the instrument is designed to protect (and not those it is not)

**Revised proposed definition – Option 3b** (carve outs consistent with the ID Determination, but with a 'reasonably assessment' *ex-ante* approach)

As per option 3b except that the ACMA would approve (iv) in advance.

Provides a transparent process for reasonably ensuring that the code (and FH Std?) appropriately protects those that the instrument is designed to protect (and not

*Note: this is similar to the approach taken for DFV customers, where actions to protect them would otherwise be in breach of the pre-paid ID process – a compliance plan is discussed and agreed with the ACMA.*

***integrated customer*** means a customer who:

- (a) uses an integrated service desk provided by the customer's carriage service provider; or
- (b) has a business to business service request system with a carriage service provider.

***integrated service desk*** means a service provided to the customer which is tailored to the customer's requirements through which the customer can communicate with the carriage service provider in relation to the customer's telecommunications services via channels dedicated to their account, and may include a dedicated contact number, email mailbox or purpose-built applications.

***Would this proposed definition risk excluding genuinely small businesses from scope?***

The DC believes this new proposed definition would not risk excluding genuinely small businesses from the Code's protections.

Mass market offerings for residential and small business consumers are set up and sold through systems that are set up for TCP compliance. For example, customer service representatives are prompted to mention the relevant "must mentions" for any transaction/interaction/query to ensure code obligations are met. Likewise, the CIS is integrated so that they can be sent to these customers during the sale process.

None of the proposed exclusions would change this. The first two exclusions are not contended; integrated service desk benefits are only available to large businesses; and no genuinely small businesses would have more than 50 services.



Published by:  
**COMMUNICATIONS  
ALLIANCE LTD**

Level 12  
75 Miller Street  
North Sydney  
NSW 2060 Australia

Correspondence  
PO Box 444  
Milsons Point  
NSW 1565

T 61 2 9959 9111  
F 61 2 9954 6136  
E [info@commsalliance.com.au](mailto:info@commsalliance.com.au)  
[www.commsalliance.com.au](http://www.commsalliance.com.au)  
ABN 56 078 026 507