

28 July 2015

Mr John Stanton
Chief Executive Officer
Communications Alliance Limited
PO Box 444
MILSONS POINT NSW 1565

Dear Mr Stanton

Proposed amendments to Telecommunications Consumer Protections Code (DR C628:2015)

Thank you for the opportunity to comment on the revised amendments to the Telecommunications Consumer Protections (TCP) Code (the draft TCP Code).

General comments

We acknowledge the further work undertaken by Communications Alliance's Working Committee subsequent to public consultation on the draft TCP Code.

A number of positive changes have been made to the previous draft of the Code (the public comment draft TCP Code). Several of our concerns in our submission dated 3 November 2014 have been addressed by the reinsertion of substantive clauses relating to advertising, debt collection and transfer of services; and a number of other changes, for example, retaining the requirement for providers to post financial hardship policies on their websites, are also positive.

We continue to have concerns about the removal of, or changes to, other substantive provisions in the existing Code. For the reasons offered in our submission dated 3 November 2014, our preference is for the draft TCP Code to retain these substantive provisions.

In view of the limited time provided to respond, we have focused on those key areas where proposed changes will reduce the protections extended to consumers under the existing Code. These key areas are:

- provisions relating to informed consent
- removal of specific residential and small business consumer protections
- the protection of consumers with disabilities and vulnerable consumers, and
- timely access to processes for consumers in financial difficulties

Provisions relating to informed consent

The requirement to establish informed consent is absent from the draft TCP Code. The proposal removes specific requirements of providers to:

- communicate an offer to allow consumers to make informed choices (clause 4.1.1)
- obtain the consumer's consent in a fair and accurate manner before entering into the contract (clause 4.3.4), and

Telecommunications Industry Ombudsman Ltd ABN 46 057 634 787

PO Box 276 Collins Street West
Vic 8007
Level 3, 595 Collins Street
Melbourne 3000

Tel freecall* 1800 062 058
Fax freecall* 1800 630 614
Telephone 03 8600 8700
Fax 03 8600 8797

TTY 1800 675 692
Email tio@tio.com.au
Web www.tio.com.au

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- take all reasonable steps to ensure that consent is informed consent (clause 7.3).

The phrase 'informed choices' has been moved from clause 4.1.1 to the summary introduction of Chapter 4. This effectively removes the requirement to establish informed consent at point of sale, from the Code rules. Reinsertion of the reference to training to assist 'consumers in making informed purchasing decisions' (clause 4.3.1(a)) and the rule about obtaining consent at transfer (clause 7.1) are both positive amendments, but these do not amount to a requirement to secure informed consent.

Informed consent has been a pivotal concept in the current TCP Code and its previous iterations, including the [ACIF Customer Transfer Industry Code C546:2007](#) (see clause 3.4). The current informed consent provisions in Chapter 4 and Chapter 7 of the TCP Code give providers clear information on how to ensure informed consent is obtained for sales and transfers. This is particularly important for vulnerable and disadvantaged consumers.

The TIO continues to receive complaints about the lack of informed consent in telecommunications transactions. We have also undertaken a number of systemic interventions into provider sales and transfer practices about this issue. There is a risk that removing informed consent requirements from the Code will increase the incidence of such complaints and issues.

We recommend retaining the rules around informed consent at point of sale and transfer.

Removal of specific residential and small business consumer protections

Clauses 6.2.1(b), 4.3.4(d) and 4.5.3 of the TCP Code confer specific protection on consumers that are over and above that conferred under the Privacy Act and the Australian Consumer Law.

The credit related obligations under Part IIIA of the Privacy Act and the Credit Reporting Privacy Code (applicable to all providers who are credit providers) only arise if the credit information relied on by the provider is part of the credit reporting framework. The credit assessment obligation in clause 6.2.1(b) and the obligation in clause 4.3.4(d) to inform a consumer of the nature of the reasons for refusal to supply a service for any reason, arise even if the credit information relied on by the provider falls outside the credit reporting framework. These obligations are not duplicated in the Privacy Act or the Credit Reporting Privacy Code. The removal of these obligations creates a clear gap.

Clauses 4.5.3, 4.3.4(d) and 6.2.1(b) of the TCP Code extend protections to *small business consumers* in addition to individuals:

- Clauses 4.3.4(d) and 6.2.1(b) apply to *small business consumers* subject to credit assessments. The credit reporting protections under Part IIIA of the Privacy Act (including section 21C) do not extend to small business consumers with commercial credit.
- Clause 4.5.3 applies to both standard form consumer contracts and business to business standard form contracts. The Australian Consumer Law's unfair contract

term protections currently only apply to standard form consumer contracts. In addition, clause 4.5.3 provides clear examples of required provider conduct (or conversely, unacceptable conduct) that can help providers better understand their obligations under the Australian Consumer Law.

We recommend retaining these clauses because of the additional protections they give to individuals and small business consumers.

Consumers with disabilities and vulnerable consumers

The headline sections in clauses 4.4.2 and 4.4.3 of the TCP Code currently give wider protection for consumers in comparison to the specific actions detailed within the sub-clauses below:

- The headline section in clause 4.4.2 requires a provider to make information available about any telecommunications products it offers which *specifically suit the disclosed needs of a consumer with a disability*. This obligation requires a provider to target its information to suit the disclosed need of a consumer with a disability. The replacement of this obligation by sub-clause 4.4.2(a) changes this obligation quite significantly in that the provider would only have to make available information about telecommunications products for consumers with different disabilities.
- The headline section in clause 4.4.3 requires a provider to *take reasonable steps to cater for the needs of disadvantaged or vulnerable consumers*. The replacement of this requirement by sub-clause 4.4.3(a) narrows a provider's obligation to provide training for its sales staff on how to interact with these consumers appropriately.

Both these headline sections are not duplications of the sub-clauses that immediately follow.

We recommend retaining the headline sections in these clauses because of the wider protections they respectively give to consumers with disabilities and to vulnerable consumers.

Timely access to processes for consumers in financial difficulties

Clause 6.6.1(a) of the TCP Code requires providers to give timely access to, and information about, processes to assist customers experiencing difficulties paying their bills. This is a proactive obligation on a provider. Replacement clause 5.1.1(a)(vi) narrows this to an obligation to ensure that a consumer may obtain information about such processes on request or in information describing a provider's telecommunications products. Under the draft TCP Code, there would be no proactive requirement to give a consumer who is experiencing difficulties paying their bills, timely access to processes that can help.

The risk here is that vulnerable and disadvantaged consumers who are experiencing financial difficulties will not know to ask or search for information about processes to assist them.

We recommend retaining clause 6.6.1(a)(iv) of the TCP Code.

References to regulation, standards or guidelines

We acknowledge the reinsertion of various clauses that refer to legislation, standards or guidelines in the revised draft TCP Code.

We recommend that these clauses are updated to refer to current versions of these documents:

- Clause 6.10.1(a) – the joint ASIC and ACCC guideline: "Debt collection guideline for collectors and creditors" issued in July 2015
- Clause 6.10.1(b) – the ACCC compliance guide: "Don't take advantage of disadvantage: A compliance guide for business dealing with disadvantaged or vulnerable consumers" issued in March 2011
- Summary of Chapter 8 – the Australian Standard: Guidelines for complaint management in organisations AS 10002:2014.

We also recommend the insertion of reference to the *Telecommunications (Interception and Access) Act 1979* in clause 1.1.5 to reflect the application of this legislation for the recording of calls, given the proposed removal of clause 4.3.6 of the TCP Code.

Certificate of mandatory consultation

Notwithstanding the concerns discussed in this and previous submissions, we confirm that the TIO has been appropriately consulted by Communications Alliance in respect of the revised Code. The TIO's completed certificate of mandatory consultation is attached.

Consent to conferral of power

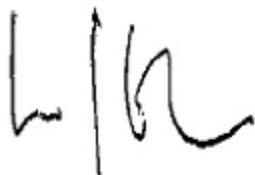
Upon registration, and subject to any further amendments, the TIO will accept conferral of powers to handle complaints under the revised Telecommunications Consumer Protections Code C628:2015.

Implementation of the revised TCP Code

We draw the Working Committee's attention to the fact that we anticipate undertaking a significant program of work to change internal systems, processes, position statements and guidance for TIO staff in readiness for the changes to the TCP Code. We would appreciate early notice of the effective implementation date for the revised Code.

If you require further information, please contact David Brockman, the TIO Executive Director – Industry, Community and Government on 03 8600 8700 or by email (david.brockman@tio.com.au).

Yours sincerely



Simon Cohen
OMBUDSMAN

Proposed changes to the Telecommunications Consumer Protections Code 2012 (public comment draft)

3 November 2014

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Introduction

The Telecommunications Consumer Protection (TCP) Code 2012 is a fundamental component of the co-regulatory framework for the telecommunications industry. The TCP Code – including the many enhancements made in 2012 – has played a key role in driving improved industry practices and reduced TIO complaints over the last two years.

We have reviewed the proposed changes to the TCP Code 2012 having regard to the following:

- the objectives of the Customer Information Provision Policy Framework (the CIP Policy Framework) issued by the Australian Communications and Media Authority (the ACMA) and Communications Alliance in May 2014
- the key commitments of the TCP Code – including its intent that consumers will receive clear, accurate and relevant information on products and services before, during and where appropriate, after the point of sale
- the context and background to the inclusion of many of the key obligations in the TCP Code, including:
 - the high volume of TIO complaints from 2007-08 and their sustained growth in 2009-10, 2010-11 and 2011-12
 - the ACMA's *Reconnecting the Customer* public inquiry in 2011, and
 - the strong call for industry to implement adequate consumer safeguards
- our role and extensive experience in resolving complaints about telecommunications services and our understanding of the drivers of these complaints, and
- our extensive experience and familiarity with the current TCP Code, given our daily use of this Code to consider and resolve complaints we receive from consumers.

We set out in this submission:

- (a) an overview of TIO new complaints and complaint issues relevant to the proposed changes, with detailed analysis in **Appendix A**
- (b) our general comments on the proposed changes that improve the clarity of the TCP Code, and
- (c) an overview of our responses and recommendations to specific changes proposed in the TCP Code, with detailed responses in **Appendix B**.

Overview of TIO new complaints and issues

Trends in new complaints

The TIO recorded and handled 138,946 new complaints from small business and individual consumers in 2013-14. This is a 12.4 per cent decrease from the 158,652 new complaints recorded in 2012-13. We recorded 193,702 new complaints in 2011-12 and 197,682 new complaints in 2010-11. See Graphs 1 and 2 in **Appendix A**.

Complaint issues relevant to the proposed changes

We analysed a number of complaint issue categories in new complaints relevant to the key changes proposed in the TCP Code. This analysis looked at the impact of the TCP Code on these particular categories of complaint issues, and in particular, how the top three providers and all other providers have performed since the commencement of the TCP Code.

This analysis is set out in **Appendix A**.

These complaint issue categories are:

- (a) Point of sale information about products or terms – relevant to the customer information provision clauses, communication of offers and advertising clauses, and selling practices clauses in the TCP Code. See Graph 3 in **Appendix A**.
- (b) Informed consent to contracts and transfers – relevant to the informed consent clauses in Chapter 4 and Chapter 7 of the TCP Code. See Graph 4 in **Appendix A**.
- (c) Enforcement of terms in circumstances that are unfair or unfair terms – relevant to customer contracts clauses, customer information provision clauses and communication of offers clauses in the TCP Code. See Graph 5 in **Appendix A**.
- (d) Variation of terms in contracts – relevant to customer contracts clauses in the TCP Code. See Graph 6 in **Appendix A**.
- (e) Actioning of undertakings made in resolution of complaints – relevant to the monitoring of progress and reporting on complaint handling compliance in the TCP Code. See Graph 7 in **Appendix A**.

Our analysis shows that:

- These issues are often the underlying causes that underpin the complaints we receive from consumers about their telecommunications services.
- In the main, these complaint issues have remained steady or shown some decreases compared to the more significant decreases in overall TIO new complaints.
- There is improvement over the period from quarter 2 of 2012-13 to quarter 4 of 2013-14 by the top three providers in four of the five issue categories analysed. The reverse is the case for all other providers with clear increases seen across all five issue categories analysed over the same period.
- These trends demonstrate the continued need for clear and unambiguous rules to help promote industry compliance with legal and regulatory obligations.

Proposed changes that improve clarity

A number of proposed changes improve the clarity of obligations in the TCP Code and its readability. These are set out briefly below:

- Some of the headline clauses in Chapters 5, 6 and 7 of the TCP Code (for example, clauses 5.4, 5.5, 6.14.1 and the new 7.3) have been removed where these are, for the most part, exact re-statements of obligations in the relevant sub-clauses. This is an improvement to the clarity of the TCP Code, provided that no substantive obligations have been inadvertently removed.
- The proposed new clause 3.5.1 consolidates requirements relating to authorised representatives. This will make it simpler for both consumers and providers to understand requirements and will clarify the role of authorised representatives.
- Provisions about access to information about payment and debt collection processes (clause 6.6.1) have been relocated to Chapter 5 under information about charging, bills and payment processes (proposed clause 5.1.1). This relocation will ensure that this information is easier to find and provides greater clarity of obligations to providers.
- The re-drafting of clauses 5.2.2 and 6.7.1(a) to (d) to remove overlap has improved the clarity of these clauses. This will help providers better understand these obligations.
- There is a change in language used in clause 7.9 of the TCP Code from 'transfer' to 'move' to an alternate wholesale network provider. This shift in terminology is likely to increase clarity about the difference in transferring between providers and moving between wholesale networks. We suggest that the title of clause 7.9 also include the change in language, for example, to change this from 'Change of wholesale network provider' to 'Move to different wholesale network provider'.

Proposed changes that reduce consumer protections

Notwithstanding the positive changes mentioned above, we have significant concerns about proposed changes to the TCP Code that reduce obligations on providers. These proposed changes present the risk of increased consumer detriment and reduce the efficacy of the TCP Code as a co-regulatory instrument. Our concerns are briefly outlined below and set out in more detail in **Appendix B**.

Removal of clauses relating to obligations under legislation

A number of clauses are proposed to be removed from or modified in the TCP Code to reduce duplication of obligations under telecommunications or other legislation such as the Australian Consumer Law.

These clauses set out a consolidation of obligations in a telecommunications specific context – this promotes compliance across the industry. Smaller providers and some of the larger ones may sometimes not have the time or resources to identify and then apply general legal obligations. These clauses are therefore valuable. Even where providers have dedicated legal or compliance teams with a strong understanding of legal obligations, there is no guarantee that their front line staff have a similar understanding. See Table 1 in **Appendix B** for further details.

We recommend retaining these clauses.

Removal of clauses relating to informed consent

A number of clauses are proposed to be removed from the TCP Code to reduce duplication of informed consent obligations covered by contract law or other legislation such as the Australian Consumer Law.

These clauses contain specific obligations in the telecommunications context that help providers understand and meet informed consent obligations under law. Properly informed consent is a critical element that protects consumers by ensuring they have knowledge of what they have agreed to. See Table 2 in **Appendix B** for further details.

We recommend retaining these clauses.

Removal of clauses resulting in reduced protections for some consumers

The proposed removal of clauses 6.2.1(b) and 4.5.3 of the TCP Code is on the grounds of reducing duplication of obligations under specific legislation.

The proposed changes reduce protections under the TCP Code:

- for residential and small business consumers on getting information about the general nature and effect of credit assessments
- for small business consumers on unfair contract term protections for business to business standard form telecommunications contracts.

See Table 3 in **Appendix B** for further details.

We recommend retaining these clauses.

Removal of clauses relating to best practice guidelines

The proposed removal of clauses 6.10.1(b) and 6.10.1(c) for providers to adopt best practice guidelines, namely the ACCC *Debt collection guideline* and the ACCC *Compliance Guide: Don't take advantage of disadvantage*, is on the grounds that they duplicate legislation.

The proposed removal of these clauses which reference important best practice external guidelines is likely to reduce consumer protections. See Table 4 in **Appendix B** for further details.

We recommend retaining these clauses.

Conversion of existing code obligations into guidelines

Communications Alliance has released a draft Industry Guidance Note on Advertising that incorporates some of the legal or interpretive obligations proposed to be removed from section 4.2 of the TCP Code.

The draft Guidance Note does not have the same standing and compliance requirements as current Code obligations. If the consequences for non-compliance are reduced, this may result in reduced incentives for compliance. The draft Guidance Note also reduces one of the key values of the TCP Code, namely the consolidation of common obligations and consumer safeguards that apply in the telecommunications industry. See Table 5 in **Appendix B** for further details.

We recommend retaining clause 4.2 in the TCP Code.

Alternatively, if the Guidance Note is introduced to replace clause 4.2, we recommend that:

- Chapter 4 of the TCP Code includes an obligation for providers to adopt and comply with the requirements in the Industry Guidance Note on Advertising
- the relevant clauses relating to the term 'cap' and compliance monitoring processes currently in the TCP Code are incorporated into this Guidance Note, and
- the Guidance Note is made publicly available to all service providers, consumers and the community.

Changes on how and when information is provided

A number of clauses proposed to be removed from or changed in the TCP Code relate to the level of prescriptiveness in how and when information is provided to consumers in light of the CIP Policy Framework.

These proposed changes reduce the current safeguards that ensure the right amount and types of information are provided or made available to consumers at particular points in the consumer-provider relationship. The general obligation in Chapter 3 of the TCP Code to provide clear, accurate, relevant and current information to consumers in a timely manner may be too broad to ensure that consumers' specific information needs are met in a consistent way across all providers. See Table 6 in **Appendix B** for further details.

We observe there is a strong case to retain provisions that codify for providers the requirements for providing information in specific form. We recommend that these generally be retained in the clauses of the TCP Code dealing with the provision of that information.

To the extent that some general rules (in Chapter 3) can replace these tailored provisions in certain cases, we recommend additional guidance be included about matters such as:

- when information may need to be provided in a specific manner, for example by giving a consumer information in writing upon request if this is the consumer's preferred communication method, or in circumstances when a consumer's service may be impacted in some way, such as by a disconnection
- what constitutes a 'timely manner' to ensure that this is not left open to interpretation, and
- best practices on making information accessible, particularly on providers' websites.

Changes that are not related to customer information provision

Some clauses are proposed to be removed because of overlap within the TCP Code or because this degree of prescription is unwarranted based on the principles and outcomes-based CIP Policy Framework. These changes include the removal of some headline clauses and clauses about compliance monitoring and reporting obligations.

The principles in the CIP Policy Framework are not relevant to nor support the proposed removal of some of the clauses in the TCP Code that relate to providers' review, monitoring and reporting processes or obligations, or to their resourcing and training of staff. These monitoring, reporting and resourcing obligations are important to ensure improvements continue to be made across industry particularly in complaint management and resolution.

Some of the proposed changes result in changes to current obligations, where the purpose of these changes are not clear or are contrary to the explanations provided – see for example, clause 8.2.1(e).

See Table 7 in **Appendix B** for further details.

We recommend that any proposed changes that are inconsistent with the scope and intent of the CIP Policy Framework and the scope of the TCP Code revisions, are not made.

Conclusion

The TIO is in a unique position to observe, identify and respond to areas of concern within the telecommunications industry. Our extensive experience in telecommunications dispute resolution, and our significant body of complaints data, allows us to demonstrate the effect the TCP Code has had on the industry over time.

Improvements in industry practices since the introduction of the TCP Code in 2012 have led to the reduction of TIO complaints over the last two years. The TCP Code – including the many enhancements made in 2012 – has played a key role in driving these improved industry practices. It serves to both safeguard consumers and to aid providers in understanding their obligations. A reduction in existing safeguards and protections in the TCP Code can result in a reversal of current positive trends.

Appendix A: Analysis of TIO new complaints and issues

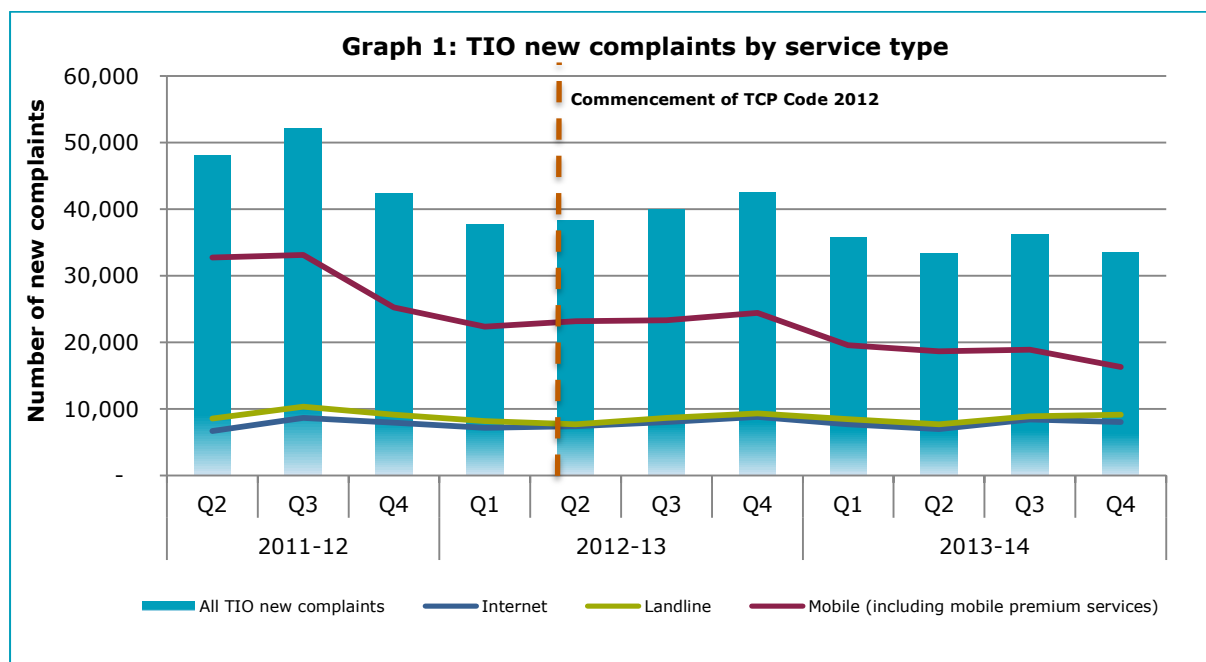
Complaints to the TIO

Overall trends in new complaints

The TIO recorded and handled 138,946 new complaints from small business and individual consumers in 2013-14. This is a 12.4 per cent decrease from the 158,652 new complaints recorded in 2012-13. We recorded 193,702 new complaints in 2011-12 and 197,682 new complaints in 2010-11.

TIO new complaints decreased by 12.3 per cent in the last quarter of 2013-14 compared to quarter 2 of 2012-13 (the first quarter after the commencement of the TCP Code 2012). Most of this decrease was the result of a 29.6 per cent reduction in new complaints about mobile services over the same period. However, internet new complaints increased by 9.1 per cent and landline new complaints increased by 19.2 per cent in the last quarter of 2013-14 compared to quarter 2 of 2012-13.

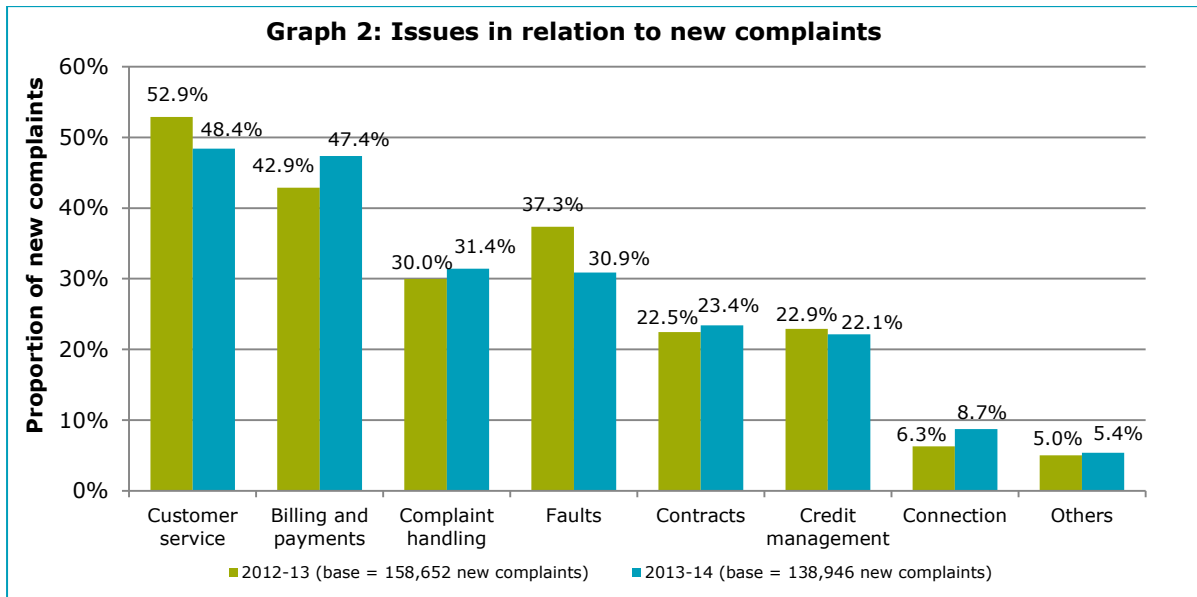
Graph 1 shows the breakdown of new complaints recorded by the TIO by service type – internet, landline and mobile (including mobile premium services) – from one year prior to the introduction of the TCP Code 2012 in September 2012 to quarter 4 of 2013-14.



Complaint issues in new complaints

We record new complaints by the types of issues that these complaints present. Issues are selected from a choice of keywords that are aligned to common complaint categories that the TIO has identified or industry codes. These issues include contractual or transfer disputes, connection and fault repair delays, credit management disputes, customer service and complaint handling issues, and billing disputes.

Graph 2 shows the breakdown of issues in relation to new complaints recorded by the TIO in 2013-14 compared to 2012-13.



Since the introduction of the new TCP Code 2012, we have seen improvements in customer service and complaint handling issues – with providers improving their timeliness and responsiveness to consumers’ complaints or concerns. We have also seen improvements in fault issues relevant to mobile services such as coverage, drop outs and slow data speeds.

These improvements are a clear demonstration of the telecommunications industry’s commitment and support for improved consumer outcomes and experience.

However, we continue to see particular issues in new complaints remain unchanged, reduce at a slower rate or even increase compared to the reduction in overall TIO new complaints since the introduction of the TCP Code 2012.

Complaints issues analysis

Scope of analysis

We analysed the following complaint issue categories in TIO new complaints that are relevant to key changes proposed in the TCP Code:

- Point of sale information about products or terms – relevant to the customer information provision clauses, communication of offers and advertising clauses, and selling practices clauses in the TCP Code
- Informed consent to contracts and transfers – relevant to the informed consent clauses in Chapter 4 and Chapter 7 of the TCP Code
- Enforcement of terms in circumstances that are unfair or unfair terms – relevant to customer contracts clauses, customer information provision clauses and communication of offers clauses in the TCP Code
- Variation of terms in contracts – relevant to customer contracts clauses in the TCP Code

- Actioning of undertakings made in resolution of complaints – relevant to the monitoring of progress and reporting on complaint handling compliance in the TCP Code.

This analysis looked at the impact of the TCP Code on these categories of complaint issues, and in particular, how the top three providers and all other providers have performed since the commencement of the TCP Code.

This analysis is set out below.

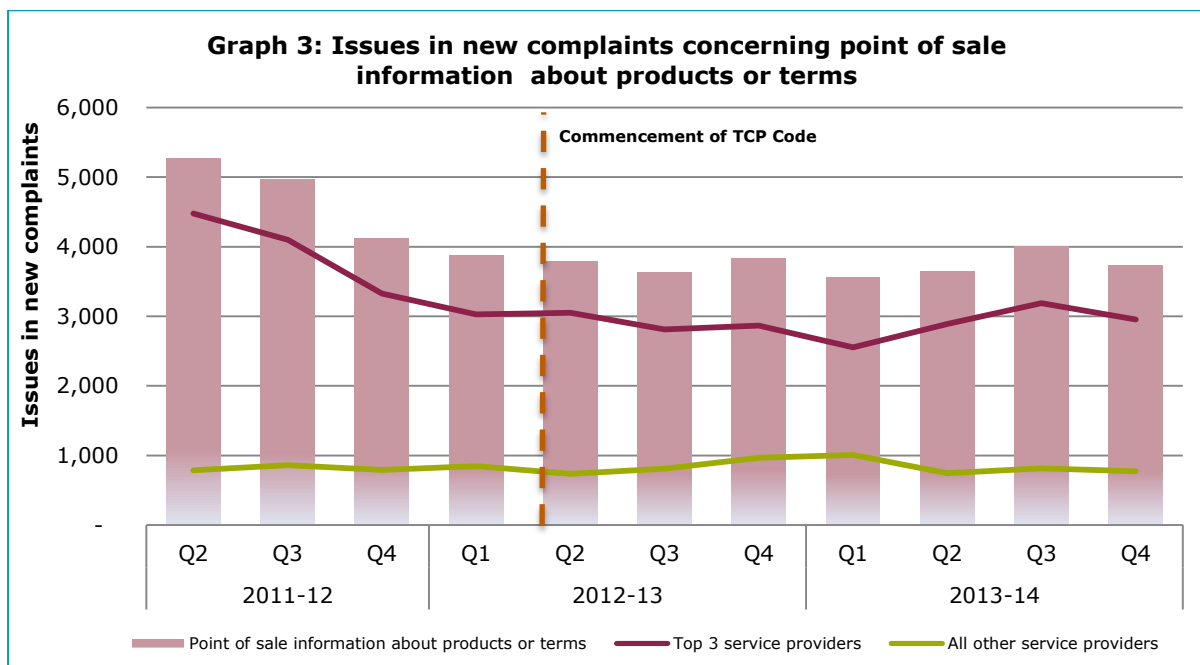
Point of sale information about products or terms

Issues in new complaints about the adequacy or accuracy of point of sale information relating to products or terms feature prominently in TIO new complaints.

This issue category:

- is the highest contracts related issue and the fifth highest type of all complaint issues in new complaints recorded by the TIO in 2013-14, and
- decreased by 1.1 percent in 2013-14 compared to 2012-13, in contrast to a 6.3 per cent decrease in all contracts issues in new complaints and a 13.2 decrease in all issues in new complaints over the same period.

The top three providers accounted for around 80 per cent of new complaint issues relating to point of sale information about products or terms, improving slightly by 3.2 per cent in quarter 4 of 2013-14 compared to quarter 2 of 2012-13. All other providers – accounting for the remaining 20 per cent of these issues – recorded an increase of 5.3 per cent over the same period. This distribution is shown in Graph 3 below.



The relatively high number of these complaint issues recorded since the introduction of the TCP Code – despite some improvements by the top three providers – indicates the continuing need for consumer safeguards around the accuracy and adequacy of point of sale information about products and terms.

Informed consent in contracts and transfers

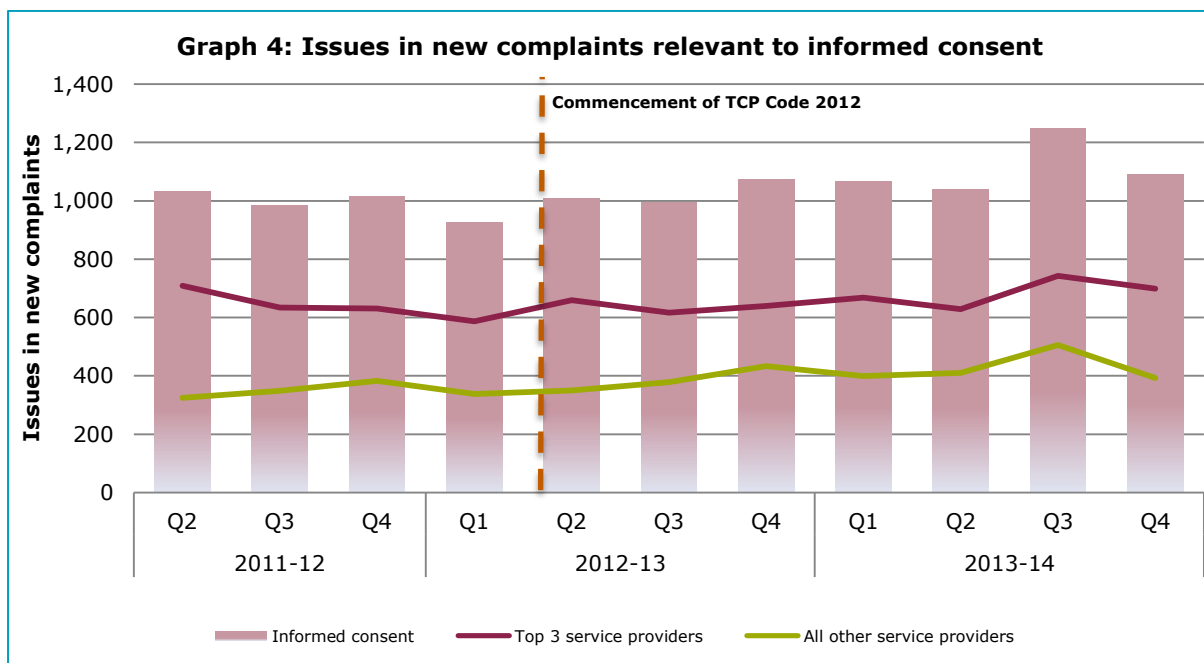
Although informed consent issues in disputed contracts and transfers are small in number compared to other contractual or transfer issues, they feature in a number of systemic interventions and investigations that the TIO conducts each year.

We continue to receive complaints from consumers who deny any knowledge of or having given informed consent to, a contract or transfer that the provider says they agreed to. Many of these types of disputes relate to landline and mobile transfers that can be protracted in nature. Consumers not only face charges from service providers they do not know, they also face the potential loss of service or number when they dispute these charges or try to transfer their services away.

This issue category:

- is present in around 1,000 new complaints recorded in each quarter in 2012-13 and 2013-14, and
- increased by 11.1 percent in 2013-14 compared to 2012-13, in contrast to a 6.3 per cent decrease in all contracts issues in new complaints and a 7.7 per cent decrease in all transfer issues in new complaints over the same period.

The top three providers accounted for around 65 per cent of new complaint issues relating to informed consent in contracts or transfers, with these issues increasing by 6.1 per cent in quarter 4 of 2013-14 compared to quarter 2 of 2012-13. All other providers – accounting for the remaining 35 per cent of these issues – recorded an increase of 12.3 per cent over the same period. This distribution is shown in Graph 4 below.



The steady number of informed consent issues recorded by the TIO each quarter since the commencement of the TCP Code indicates a continued need for clear and unambiguous information to help providers meet their legal obligations around obtaining informed consent for telecommunications sales and transfers.

Enforcement of terms in circumstances that are unfair or unfair terms

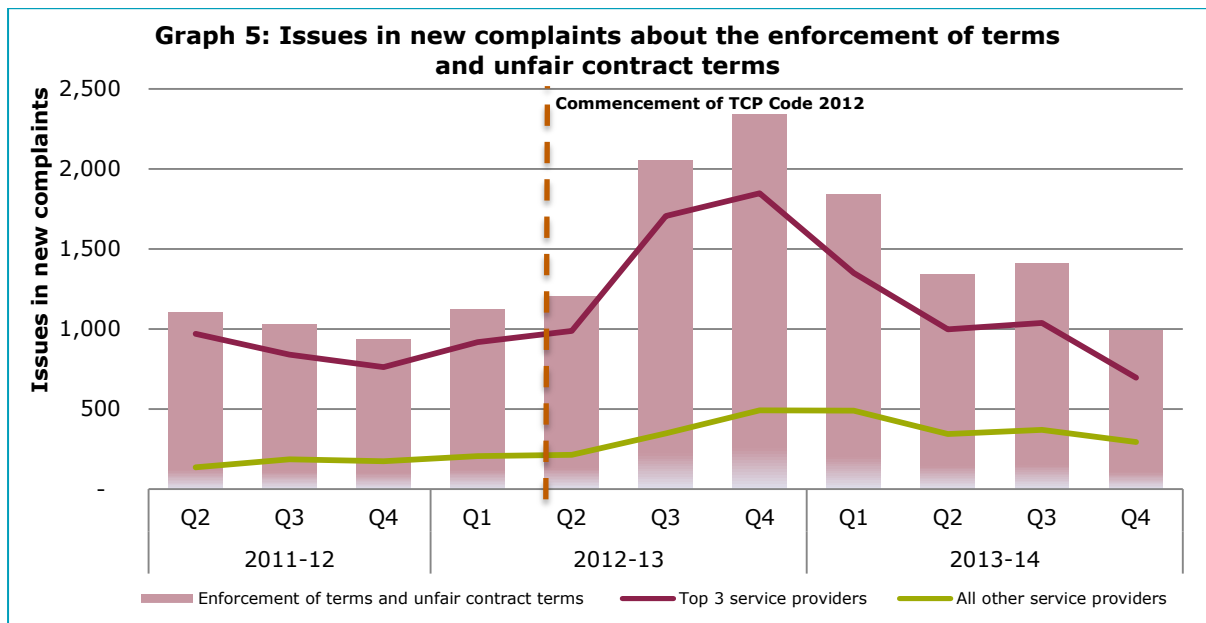
Issues in new complaints about the enforcement of terms by providers in circumstances that are unfair are the second highest contracts related issue in TIO new complaints in 2013-14. Issues about unfair contract terms are a smaller category of contracts related issues.

Both these issues usually involve the consumer disputing the provider’s attempts to enforce particular terms in a contract because:

- there is inaccurate or inadequate information at the point of sale, or
- the enforcement of these terms is not fair in the circumstances – for example, being charged an early termination fee although the provider failed to provide an adequate service over the life of the contract.

These issues decreased by 17.3 percent in 2013-14 compared to 2012-13, in contrast to a 6.3 per cent decrease in all contracts issues in new complaints and a 13.2 decrease in all issues in new complaints over the same period. This reduction was mainly driven by one large provider with improvements seen in quarter 1 of 2013-14 onwards after spikes in quarters 3 and 4 of 2012-13.

The top three providers accounted for around 70 per cent of new complaint issues relating to enforcement of terms in circumstances that are unfair or involving unfair contract terms, improving by 29.5 per cent in quarter 4 of 2013-14 compared to quarter 2 of 2012-13. All other providers – accounting for the remaining 30 per cent of these issues – recorded an increase of 37.6 per cent over the same period. This distribution is shown in Graph 5 below.



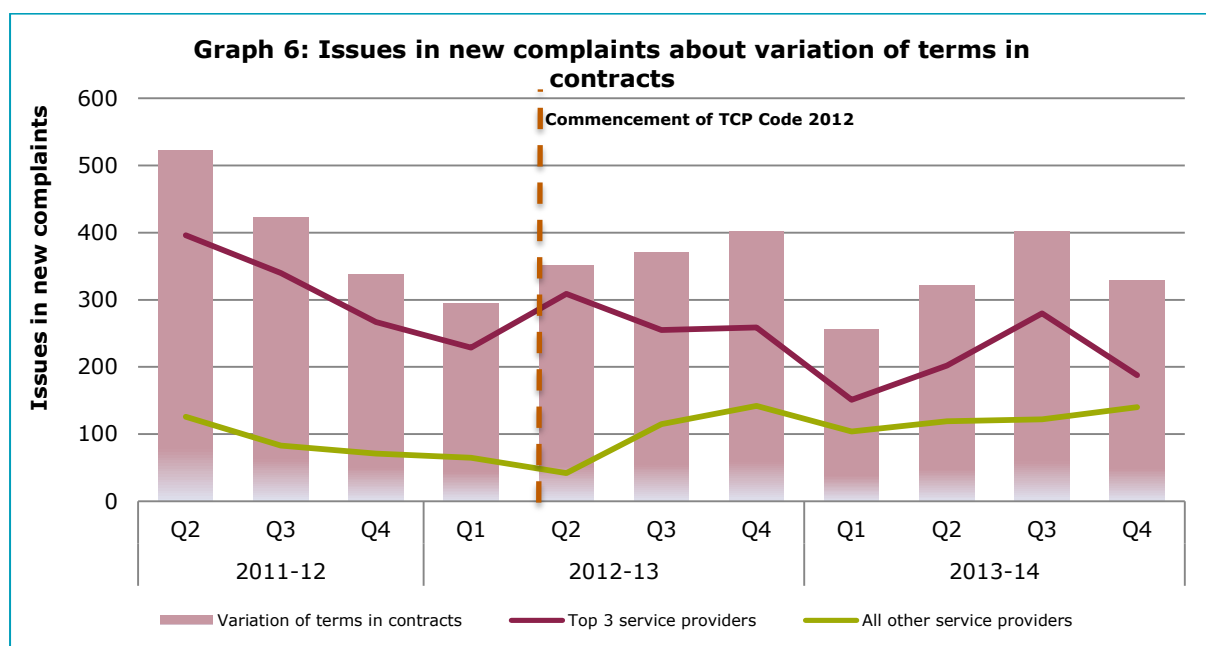
Despite improvements by the top three providers for this issue category, the volume of these complaint issues indicates the continuing need for consumer safeguards around point of sale information and consumer contract obligations that relate to the enforcement of terms or reliance on unfair terms.

Variation of terms in contracts

Issues involving variation of terms arise in a small but relatively consistent number of new complaints recorded by the TIO over the last two years. Consumers who complain about this issue usually dispute the unilateral variation of their contract by their provider about the products or services or about the price for their service.

This issue category decreased by 7.9 percent in 2013-14 compared to 2012-13, in contrast to a 6.3 per cent decrease in all contracts issues in new complaints and a 13.2 decrease in all issues in new complaints over the same period.

The top three providers accounted for around 60 per cent of new complaint issues relating to variation of contracts, improving by 39.2 per cent in quarter 4 of 2013-14 compared to quarter 2 of 2012-13. All other providers – accounting for the remaining 40 per cent of these issues – recorded an increase of 233.3 per cent over the same period. This distribution is shown in Graph 6 below.



While the number of these issues is relatively low and there have been improvements by the top three providers, there has been an upward trend for the non-top three providers since quarter 2 of 2012-13.

Actioning of undertakings made in resolution of complaints

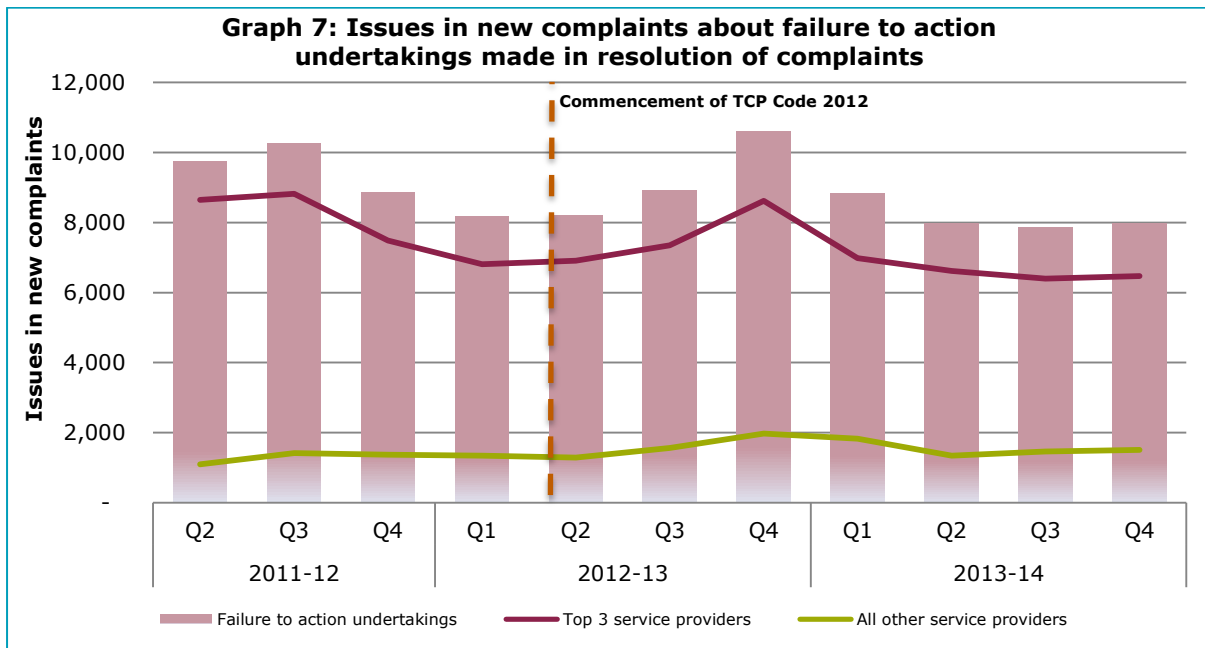
Failure to action undertakings made in resolution of complaints continues to feature prominently in TIO new complaints.

This issue category:

- is the second highest type of all complaint issues in new complaints, and the highest complaint handling issue recorded by the TIO in 2013-14, and
- decreased by 8.5 percent in 2013-14 compared to 2012-13, in contrast to a 9.1 per cent decrease in all complaint handling issues in new complaints, and a 13.2 decrease in all issues in new complaints over the same period.

The top three providers accounted for around 82 per cent of new complaint issues relating to failure to action undertakings, improving slightly by 6.4 per cent in quarter 4

of 2013-14 compared to quarter 2 of 2012-13. All other providers – accounting for the remaining 18 per cent of these issues – recorded an increase of 16.8 per cent over the same period. This distribution is shown in Graph 7 below.



These trends highlight the continued importance for retention of providers’ review, monitoring and reporting processes or obligations, and their resourcing and training of staff. These obligations are important to ensure improvements continue to be made across industry particularly in complaint management and resolution.

Appendix B: Detailed responses to proposed changes

Table 1 Removal of clauses relating to obligations under legislation	
<p>Proposed changes</p> <p>These clauses are proposed to be removed from the TCP Code to reduce duplication of obligations under telecommunications or other legislation such as the Australian Consumer Law.</p>	<p>TCP Code 2012 clauses:</p> <p>4.1.1, 4.1.3(f), 4.2.1 (all sub-clauses), 4.2.2, 4.2.3, 4.2.4, 4.2.8, 4.3.2, 4.3.3, 4.3.4, 4.3.5, 4.3.6, 4.5.3, 4.6.3, 6.2.1(b), 6.8.1(g), 6.10.1(b), 6.10.1(c), 7.2, 7.3, 7.10, Chapter 8 Summary (reference to Australian Standard)</p>
<p>TIO response</p> <p>These TCP Code clauses do not duplicate obligations under legislation. They elaborate and provide clear examples of required provider conduct (or, conversely, unacceptable conduct) that arise under obligations in legislation, where the obligations in legislation may only be generally stated.</p> <p>This level of specificity in the TCP Code is important because:</p> <ul style="list-style-type: none"> • The Code sets out a consolidation of obligations in a telecommunications specific context that if complied with, would ensure a fair degree of compliance with general legal obligations under legislation such as the Australian Consumer Law. • The telecommunications industry is a diverse one in terms of the size of providers and the resources at their disposal. Smaller providers and some of the larger ones may sometimes not have the time or resources to identify and then apply general legal obligations – for example, the prohibition in the Australian Consumer Law against engaging in misleading and deceptive conduct – in the context of the telecommunications industry. • Even where providers have dedicated legal or compliance teams with a strong understanding of legal obligations, there is no guarantee that all front line staff have a similar understanding, as they are likely to be less familiar with or able to interpret a wide range of legislation. • Smaller providers and some of the larger ones may also not be familiar with or be across obligations that relate to less commonly used legislation – the obligations in clause 4.3.6 are an example of this. • Some of the current provisions in the TCP Code contain requirements that may not necessarily meet the threshold of legal obligations, such as misleading or deceptive conduct under the Australian Consumer Law. However, these are requirements that promote the use of clear language when communicating with consumers and which may in turn reduce conduct that would otherwise be confusing to consumers. • Many providers and their front line staff are unlikely to see that their actions or conduct amount to a breach of legal obligations, without the specificity or examples set out in the TCP Code. For example, a provider making an offer of a product that is written in unclear language, or language unsuited to an intended audience, is not likely to view itself to be 'engage[ing] in conduct that is misleading or deceptive or is 	

likely to mislead or deceive’.

The TIO continues to record complaints involving poor point of sale information about products and terms, the enforcement of terms in circumstances that are unfair or reliance on unfair terms, or where informed consent is not obtained. Although there are some improvements in industry practices, this is not consistent across all providers – see Graphs 3, 4 and 5 in **Appendix A**.

Recommendation

We recommend retaining these code clauses in the TCP Code.

Table 2 Removal of clauses relating to informed consent

Proposed changes	TCP Code 2012 clauses:
<p>These clauses are proposed to be removed from the TCP Code to reduce duplication of informed consent obligations under the law or legislation such as the Australian Consumer Law.</p>	<p>4.1.1, 4.3.4, 4.3.5, 7.2, 7.3</p>
<p>TIO response</p> <p>These clauses elaborate and provide clear examples of required provider conduct (or, conversely, unacceptable conduct) to meet informed consent obligations under law.</p> <p>Properly informed consent is a critical element that protects consumers by ensuring they have knowledge of what they have agreed to. Information provided to consumers about services that is clear, easy to understand and not onerous to digest is an obvious initiative to help consumers make informed decisions about the services they wish to purchase. While the concept of informed consent is important for all consumers, it is of particular significance when the consumer could be considered vulnerable or disadvantaged.</p> <p>The proposed removal of clauses in Chapter 7 that deal with informed consent in transfers (clauses 7.2 and 7.3) as well as the corresponding clauses in Chapter 4 that relate to consent in contracts and promoting transfers (clauses 4.3.4 and 4.3.5) would create a clear gap in the Code. The informed consent clauses in Chapter 4 and Chapter 7 are relevant to both telecommunications sales and transfers. These clauses give providers clear information on how to meet their legal obligations around obtaining informed consent across both these types of transactions.</p> <p>The TIO continues to record complaints involving lack of informed consent for telecommunications sales or transfers – see Graph 4 in Appendix A. Despite reduction in new complaints to the TIO over the past two years, issues relating to informed consent have increased over the same period for all providers.</p>	
<p>Recommendation</p> <p>We recommend retaining these code clauses in the TCP Code.</p>	

Table 3 Removal of clauses resulting in reduced protections for some consumers

<p>Proposed changes</p> <p>These clauses are proposed to be removed from the TCP Code to reduce duplication of obligations in the Privacy Act, the Credit Reporting Privacy Code and/or the Australian Privacy Principles or under the Australian Consumer Law.</p>	<p>TCP Code 2012 clauses:</p> <p>4.5.3, 6.2.1(b)</p>
<p>TIO response</p> <p>These clauses confer specific protection on residential and small business consumers over and above that conferred under the Privacy Act or Australian Consumer Law.</p> <p>The proposed removal of these clauses raises concerns on several grounds:</p> <ul style="list-style-type: none"> • The credit related obligations under the Privacy Act and the Credit Reporting Privacy Code only arise if the credit information relied on by the provider is part of the credit reporting framework. The credit assessment obligation in clause 6.2.1(b) of the TCP Code arises even if the credit information relied on by the provider falls outside the credit reporting framework. Removing this obligation would remove safeguards that all consumers currently have under the TCP Code. • The credit reporting protections under Part IIIA of the Privacy Act (including section 21C) do not extend to <i>small business consumers</i> with commercial credit. The proposed removal of clause 6.2.1(b) of the TCP Code would reduce current consumer protections that providers are required to meet for small business consumers who are subject to credit assessments. • The Australian Consumer Law’s unfair contract term protections only relate to standard form consumer contracts and do not apply to business to business standard form contracts. Removing clause 4.5.3 would remove safeguards that small business consumers currently have under the TCP Code. <p>The TIO continues to record new complaints involving enforcement of terms in circumstances that are unfair or reliance on unfair terms, or variation of terms, with increases recorded for the non-top three providers since quarter 2 of 2012-13. See Graphs 5 and 6 in Appendix A.</p>	
<p>Recommendation</p> <p>We recommend retaining these code clauses in the TCP Code.</p>	

Table 4 Removal of clauses relating to best practice guidelines

<p>Proposed changes</p> <p>These clauses are proposed to be removed from the TCP Code to reduce duplication of obligations in legislation/guidelines.</p>	<p>TCP Code 2012 clauses:</p> <p>6.10.1(b), 6.10.1(c)</p>
<p>TIO response</p> <p>The requirements in clauses 6.10.1(b) and 6.10.1(c) for providers to adopt best practice guidelines, namely the ACCC <i>Debt collection guideline</i> and the ACCC <i>Compliance Guide: Don't take advantage of disadvantage</i> represent best practice on these specific issues.</p> <p>The proposed removal of these clauses which reference important best practice external guidelines is likely to reduce consumer protections. Continued retention of references to these guidelines in the TCP Code will give providers clarity on best practices they can adopt when engaging in debt collection or dealing with vulnerable or disadvantaged consumers.</p>	
<p>Recommendation</p> <p>We recommend retaining these code clauses in the TCP Code.</p>	

Table 5 Conversion of existing code obligations into guidelines

<p>Proposed changes</p> <p>These clauses are proposed to be converted into a detailed industry guidance note.</p>	<p>TCP Code 2012 clauses:</p> <p>4.2.1, 4.2.2, 4.2.3, 4.2.5</p>
<p>TIO response</p> <p>Communications Alliance has released a draft Industry Guidance Note on Advertising that incorporates some of the legal or interpretive obligations proposed to be removed from section 4.2 of the TCP Code.</p> <p>The TCP Code includes clear examples of required provider conduct (or, conversely, unacceptable conduct) that arise under obligations in legislation – such as clause 4.2. Non-compliance with these clauses in the TCP Code is likely to involve both a breach of the law and a breach of code obligations. The draft Guidance Note however does not have the same standing and compliance requirements as current Code obligations. If the consequences for non-compliance are reduced, this may result in reduced incentives for compliance.</p> <p>The draft Guidance Note also reduces one of the key values of the TCP Code, namely the consolidation of common obligations and consumer safeguards that apply in the telecommunications industry. Providers and their staff would need to be familiar with and have access to the TCP Code, guidelines such as the Industry Guidance Note on Advertising and various pieces of legislation.</p> <p>Further, a number of guidelines issued by Communications Alliance are at present only available to providers who are current members of Communications Alliance. If</p>	

guidelines are going to be issued, it will be important that these are made publicly available to service providers, consumers and the community more broadly, in the same manner as these rules are currently publicly available through the Code.

Draft Industry Guidance Note on Advertising

The draft Industry Guidance Note on Advertising contains some additional requirements and guidance not currently in the Code. The additional requirements will help providers better understand their obligations when advertising their products and services.

However, the draft Guidance Note does not incorporate the current TCP Code rules in clause 4.2.1(l) on advertising using the term 'cap'. The draft Guidance Note also does not incorporate the compliance monitoring processes in clause 4.2.5 of the TCP Code. It is not clear why these clauses have been omitted.

Recommendation

We recommend retaining clause 4.2 in the TCP Code.

Alternatively, if the Industry Guidance Note on Advertising is introduced to replace clause 4.2, we recommend that:

- Chapter 4 of the TCP Code includes an obligation for providers to adopt and comply with the requirements in the Guidance Note
- the relevant clauses relating to the term 'cap' and compliance monitoring processes currently in the TCP Code are incorporated into this Guidance Note, and
- the Guidance Note is made publicly available to all service providers, consumers and the community.

Table 6 Changes on how and when information is provided

Proposed changes	TCP Code 2012 clauses (not exhaustive):
<p>A number of clauses proposed to be removed from or changed in the TCP Code relate to the level of prescriptiveness in how and when information is provided to consumers in light of the CIP Policy Framework.</p>	<p>3.3.3, 3.3.4, 4.1.3, 4.1.3(i), 4.1.5(a), 4.1.5(b), 4.5.1, 4.5.2, 5.1.1(a), 5.2.5, 5.2.6(a)(i), 6.1.1(a), 6.1.1(b), 6.3.1(c), 6.4.1(c), 6.11.1(a), 6.11.1(b), 6.11.1(c), 6.11.1(d), 6.13.1(a), 7.9.1(b), 8.1.1(b)(ii), 8.1.1(b)(iv), 8.1.1(b)(v), 8.1.1(b)(vi), 8.2.1(d)</p>
<p>TIO response</p>	
<p>It is unclear from the explanations provided for some of these changes, how the changes are consistent with the push/pull requirements at different stages of the customer information corridor as outlined in the CIP Policy Framework.</p> <p>These proposed changes raise several concerns:</p>	

- A number of provisions that require information to be made available on providers' websites are proposed to be removed (clauses 6.11.1(a), 6.11.1(b), 6.11.1(c), and 8.1.1(b)(v) are examples). Having information on a provider's website is often the quickest and most cost effective way for providers to give information to consumers. While some consumers may have a requirement for information to be provided in other ways, in the main, most consumers would benefit from a requirement to have this information online.
- Several clauses that relate to the accessibility of information (for example, clauses 5.2.5, 8.1.1(b)(ii) and 8.1.1(b)(vi)) are proposed to be removed or revised such that the requirement to make specific types of information available in a form that is easy to understand, is no longer present.

Although clause 3.2.1 in the TCP Code imposes a general obligation on providers to provide clear, accurate, relevant and current information to consumers in a timely manner, the lack of specific obligations to do this at particular points in the consumer-provider relationship may result in reduced accessibility for consumers. It may also not be clear to providers that clause 3.2.1 applies to, for example, requiring a bill to be presented and formatted in a manner to help consumers easily read and understand their bill (a current obligation in clause 5.2.5). Clause 3.2.1 may be too broad to ensure that consumers' specific information needs are met in a consistent way across all providers.

- Some clauses that require a provider to give information to the consumer in writing, and through any other means agreed between the parties, are proposed to be removed. These include, for example, the requirement to give written advice of any restrictions on a service at the time of application under sub-clause 6.3.1(c), and to give written details of a financial hardship arrangement under sub-clause 6.13.1(a). Other clauses similarly impacted include current clauses 4.1.5(a), 4.1.5(b), 6.1.1(b), 6.4.1(c), and 8.2.1(d). While some of these proposed changes are said to be consistent with the CIP Policy Framework, others are not so explained. The policy reasons for removing these safeguards that require having some types of information given to consumers in a particular manner or upon request are not clearly explained.
- Some clauses are proposed to be amended or removed in favour of the general requirement of a 'timely manner' (for examples, the timeframe in clause 6.1.1(b) has been removed by the relocation of this clause to clause 6.5.1). What constitutes a 'timely manner' is open to interpretation and this may serve to lessen protections afforded to consumers.

See also Graph 3 in **Appendix A**.

Recommendation

We observe there is a strong case to retain provisions that codify for providers the requirements for providing information in specific form. We recommend that these generally be retained in the clauses of the TCP Code dealing with the provision of that information.

To the extent that some general rules (in Chapter 3) can replace these tailored provisions in certain cases, we recommend additional guidance be included about matters such as:

- when information may need to be provided in a specific manner, for example by giving a consumer information in writing upon request if this is the consumer's preferred communication method, or in circumstances when a consumer's service may be impacted in some way, such as by a disconnection
- what constitutes a 'timely manner' to ensure that this is not left open to interpretation, and
- best practices on making information accessible, particularly on providers' websites.

Table 7 Changes that are not related to customer information provision

Proposed changes	TCP Code 2012 clauses (examples only):
<p>A number of clauses proposed to be removed from or changed in the TCP Code relate to duplication within the Code or the level of prescriptiveness in monitoring compliance and reporting obligations.</p>	<p>4.2.5, 8.1.1(d), 8.5, 8.5.1 4.1.1(f), 4.1.3(e), 6.6.1(a) after being moved to 5.1.1(a)(vi), 8.2.1(e)</p>
<p>TIO response</p> <p>Our concerns about these proposed changes are as follows:</p> <p><i>Monitoring and reporting obligations</i></p> <p>The principles in the CIP Policy Framework are not relevant to nor support the proposed removal of some of the clauses in the TCP Code that relate to providers' review, monitoring and reporting processes or obligations, or to their resourcing and training of staff. See for example, clauses 4.2.5, 8.1.1(d) and former clause 8.5 (now renumbered clause 8.4). These continue to be important compliance obligations to ensure consistent good practices across all providers. These monitoring, reporting and resourcing obligations are also important to ensure improvements continue to be made across industry particularly in complaint management and resolution – see Graph 7 in Appendix A.</p> <p><i>Changes that are unclear or have unintended consequences</i></p> <p>Some of the proposed changes result in changes to current obligations, where the purpose of these changes is not clear or creates unintended consequences. For example:</p>	

- Sub-clause 4.1.3(e) is proposed to be removed on the basis it is duplicated in the current sub-clause 4.1.4(c). However, the obligation in clause 4.1.4(c) only arises if a consumer has identified a particular need, whereas the obligations in sub-clause 4.1.3(e) requires this information to be provided or made available in more general circumstances.
- The requirement for providers to write to consumers at their last known address if they are unable to contact a consumer to discuss their complaint (clause 8.2.1(e)) is proposed to be removed. We understand that sometimes consumers can be difficult to contact, and that providers will need to close unresolved complaints if a consumer cannot be contacted. However, it is important that providers make every effort possible to contact consumers before doing so.

Recommendation

We recommend that any proposed changes that are inconsistent with the scope and intent of the CIP Policy Framework and the scope of the TCP Code revisions, are not made.