

Getting the Act Together

Hamish Fraser and Michael Stojanovic outline the new consolidated telecommunications industry code.

On 18 May 2008, the Australian Communications and Media Authority (ACMA) registered a new telecommunications industry code and accompanying guidelines. The new code is the 'Telecommunications Consumer Protection Code' (TCPC) and the accompanying guidelines are the 'Telecommunications Consumer Protections Guidelines' (TCP Guidelines).

The TCPC was developed and published by industry body the Communications Alliance Ltd and approved by ACMA.

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The TCPC replaced the following (now out of date) industry codes:

- Customer Information on Prices, Terms and Conditions Industry Code;
- Credit Management Industry Code;
- Billing Industry Code;
- Customer-Transfer Industry Code;
- Complaint Handling Industry Code; and
- Consumer Contracts Industry Code.

Legal status of the TCPC

The TCPC is an industry code for the purposes of the *Telecommunications Act 1997 (the Act)*, and is relevant to all carriage service providers that supply services to customers and consumers as defined in the TCPC (we discuss these definitions below). The TCPC generally refers to carriage service providers simply as 'Suppliers'.

Whilst compliance with the TCPC is technically voluntary, if a Supplier fails to comply with the TCPC, ACMA may issue a written direction to the Supplier ordering compliance. If the Supplier does not comply with ACMA's written direction, the Supplier will be in breach of section 121(2) of the Act, and may be liable for civil penalties to the Commonwealth of up to \$250,000 for a body corporate, or \$50,000 for any other person or entity (section 570(3) of the Act). Accordingly, for practical purposes, carriage service providers should consider compliance with the TCPC to be mandatory.

Legal status of the TCP Guidelines

The TCP Guidelines are arranged in a 'questions and answer' format, and seek to clarify certain aspects of the TCPC. In some instances, the TCP Guidelines use examples to demonstrate compliant and non-compliant conduct. While the TCP Guidelines are not themselves enforceable under the Act, carriage service providers can assume that both the ACMA and Federal Court will consider them persuasive in any dispute over the interpretation of the TCPC.

Arrangement of the TCPC

The TCPC is organised into ten chapters. The first two chapters deal with introductory issues and definitions and the last with administration and compliance. The remaining chapters align closely to the superseded codes; namely:

- Chapter 3. General Rules;
- Chapter 4. Customer Information of Prices, Terms and Conditions;
- Chapter 5. Consumer Contracts;
- Chapter 6. Billing;
- Chapter 7. Credit Management;
- Chapter 8. Customer Transfer; and
- Chapter 9. Complaints Handling.

Given the all encompassing nature of the TCPC, all carriage service providers and their advisors should review the new code to ensure that their processes and procedures are compliant with it.

It is worth noting that one of the principles of the TCPC's design was to try and preserve rights and obligations that existed under the superseded codes. Of course, as is discussed in a little more detail below, bringing together 6 other codes meant this has not always been strictly possible.

This article discusses a few of the more significant rules in the TCPC, including a number that experience suggests some Australian carriage service providers may want to review against their existing processes and procedures particularly carefully. Whilst many of the rules discussed in this article already existed in one form or another under the codes replaced by the TCPC, this presents a good opportunity for Suppliers to review their existing compliance regimes.

Definitions of 'Customer' and 'Consumer'

As noted above, the TCPC replaces 6 industry codes. One of the objectives of its creation was to ensure that residential and small business customers were afforded proper consumer protection, an area where the existing codes were in some respects inconsistent and unclear. One of the ways in which this inconsistency was perhaps most apparent was that each of the previous codes used different definitions of a 'customer' and/or 'consumer'.

The new TCPC has dealt with this issue by adopting clear definitions, being 'Consumer' (used in connection with the 'Consumer Contract' sections of the TCPC) and 'Customer' (used elsewhere in the TCPC). Suppliers should take care when reading the TCPC to ensure they do not confuse one definition with the other.

Definition of 'Consumer'

Under the TCPC, a 'Consumer' means:

- a) *person who acquires a Consumer Product for the primary purpose of personal or domestic use; or*
- b) *business or non-profit organisation which at the time it enters into the Consumer Contract:*
 - a. *does not have a genuine and reasonable opportunity to negotiate the terms of the Consumer Contract; and*
 - b. *has or will have an annual spend with the Supplier [our emphasis] which is, or is estimated on rea-*

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sonable grounds by the Supplier to be, no greater than \$20,000,

- c. other than a person acquiring a Consumer Product for resale.

As noted above, a 'Supplier' under the TCPC means a carriage service provider.

For brevity, we have not reproduced the cross-referred definitions of 'Consumer Contract' and 'Consumer Product' in this article. Nevertheless, it should be clear enough that this definition casts the TCPC's net widely, including over any business spending up to \$20,000 with a single Supplier in a year. This has the potential to catch business that are significantly larger than the average 'Small Business' (eg. the ATO considers a small business will have an annual turnover of less than \$2M).

It is notable that, while this definition is similar in form to the definition of a 'consumer' under the *Trade Practices Act 1974 (TPA)*, it is not the same. Accordingly, in some circumstances (eg, with respect to warranties implied into contracts for the supply of services by the TPA), Suppliers may need to consider both the TCPC's definition and the TPA's.

Definition of 'Customer'

Under the TCPC, a 'Customer':

means a residential or small business customer who:

- a) is a party to a Contract; or
- b) is eligible under the criteria set by a Supplier to enter into a Contract to acquire a Telecommunications Product, other than for the purposes of resale.

Again, for brevity, we will not reproduce the cross-referred definitions of 'Contract' or 'Telecommunications Product' in this article. However, we note the distinction the TCPC accordingly draws between the terms 'Contract' and 'Telecommunications Product' (used in the definition of 'Customer') and 'Consumer Contract' and 'Consumer Product' (used in the definition of 'Consumer').

Suppliers should limit their use of legal terms...

While the definitions of 'Customer' and 'Consumer' would appear to cover much the same ground, Suppliers should be aware of the subtle differences between them. In particular, as noted above, the possibility that a relatively large organisation might fall within the definition of a 'Consumer' (because they spend less than \$20,000 per annum with a particular Supplier), while probably not falling within the

definition of a 'Customer' (because they are unlikely to be considered a 'residential or small business customer').

Conversely, truly big business buyers of telecommunications services may not be covered by the TCPC at all, whereas they may have been under some of the codes replaced by the TCPC. We discuss this further, below.

Other parts of the TCPC

As noted above, many parts of this new code are merely a merger of the old codes with no significant changes. However it is timely to review some of their more noteworthy aspects.

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Rule 3.1 – Plain Language

Rule 3.1 states that:

3.1.1 A Supplier must communicate with its Customers in simple, plain language.

The TCP Guidelines clarify that any contract is a 'communication with a Customer', and accordingly must comply with this rule.

While the TCP Guidelines do not elaborate further, it is reasonable to assume that this rule is intended to stamp out the use of legal jargon and complex clauses in customer contracts. Suppliers should therefore limit their use of legal terms like 'indemnity', 'limitation of liability', 'to the extent permitted by law', 'consideration', 'waiver' and 'consequential loss'.

Suppliers should also be careful when 'importing' terms and conditions from overseas jurisdictions, particularly the United States, where use of arcane legal language in contracts remains common.

Words such as 'therefore', 'hereunder', 'hence', 'notwithstanding' and 'hereunto' should be avoided. As a general rule-of-thumb, any person writing terms and conditions should ask themselves the question, 'if I was explaining this concept to a friend, would I use that word?'. If the answer to the question is 'no', then 'plain language' is probably not being used.

Rules 4.1.2 to 4.1.4 – Disclaimers

As with the previous code (C521:2004), the TCPC substantially regulates the use of disclaimers. A Disclaimer is defined to mean '...words used in Advertising Material which qualify, disclaim or add to the principal message or to a specific offer'.

Rule 4.1.2 states that 'A Disclaimer must not be used to negate the principal messages of Advertising Material'.

Rule 4.1.3 states that 'Disclaimers must be clear and readily understandable, having regard to the type of Advertising Material, including the medium or format used and its intended audience.' The TCP Guidelines include specific instructions as to font

size for Disclaimers – for example, a font size the equivalent of 10 point Times New Roman must be used in advertising material of A4 size or greater.

Finally, rule 4.1.4 states that disclaimers must, in connection with written offers, be placed next to the offer or linked to a footnote by an asterisk or other symbol. In television and radio advertising, the disclaimer must form a visual or audio part of the advertisement.

Rule 4.2.4(a)(ii) to (iii) – Product descriptions and Fitness for intended use

Before entering into a contract with a customer, the Supplier must explain certain things to the Customer, or offer the Customer certain information. Rules 4.2.4 and 4.2.5 list these obligations.

Rule 4.2.4(a)(ii) requires a Supplier to 'sufficiently describe each Telecommunications Product'. This is a potentially onerous obligation, given the vast differences that members of the general public have in their knowledge of telecommunications products. The TCP Guidelines provide the following example of a 'sufficient description':

This is a high-speed internet service so that you can have faster access to the internet. The service permits you to use the telephone at the same time as you are on the internet.

While this description may well be sufficient for many Customers, it could be inappropriate for a particularly knowledgeable Customer with specific requirements (eg,

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who might require that the service provide specific upload or download speeds), or it could be inappropriate for a Customer with no knowledge of the relevant technologies (and for whom concepts such as 'high-speed' are likely to be meaningless).

Rule 4.2.4(a)(iii) goes further, and requires that, if a Customer has stated their purpose for wanting a telecommunications product, the Supplier inform the Customer of:

- a) *anything reasonably known about the performance and/or availability of the telecommunications product that might affect the telecommunications product's use for that purpose; and*
- b) *any other telecommunications products needed for its use.*

These rules place significant obligations on the Supplier to ensure that potential Customers know what they require of telecommunications products, and to ensure that the telecommunications product the Customer ends up purchasing will meet those requirements.

Accordingly, Suppliers should factor the time and resources that are likely to be required to meet these requirements into their business processes. Simply 'signing up' a Customer to a product without discussing the Customer's requirements with them is unlikely to be acceptable.

A significant change from the superseded code is that Chapter 4 is limited by the definition of Customer (as discussed above), and accordingly does not apply to big business contracts that fall outside the definition. In any event, the protection afforded by Chapter 4 to larger companies would be fairly limited in practice. However, as noted below with respect to Billing, the corresponding change in that chapter may be more significant.

Rule 5.1 – Unfair Terms

The general prohibition against terms in a Consumer Contract that are 'unfair' has been carried over to the TCPC from the previous 'Consumer Contracts Industry Code'. It is a broadly worded prohibition, expressed in rules 5.1.1 and 5.1.2:

5.1.1 Prohibition: *A term in a Consumer Contract must not be unfair.*

5.1.2 Meaning of unfair: *A term will be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under*

the Consumer Contract to the detriment of the Consumer.

Rule 5.1.3 then attempts to 'flesh out' a number of specific instances of unfair terms, including terms that:

- '...exclude or limit the Supplier's liability in a manner that is illegal, unclear or misleads the Consumer as to their legal rights' (5.1.3(d)(i));
- allow a Supplier to 'terminate for convenience' during a fixed contract period (5.1.3(d)(v));
- allow a Supplier to extend a fixed term contract without first '...obtaining the Consumer's express consent a reasonable time before the period expires' (5.1.3(d)(vii)); and
- require a Consumer to licence or assign intellectual property rights in relation to communications with other end-users (5.1.3(d)(xv)).

Rule 5.1.3(ix) – Unfair term – Unilateral variation by Supplier

Rule 5.1.3(ix) states that a term that allows a Supplier to unilaterally vary the '...characteristic of goods and services, including price, in a Consumer Contract with a Fixed Contract Period...' is unfair unless:

- a) *the Consumer is given notice in writing of the change at least 21 days in advance; and*
- b) *the Consumer is offered a right to terminate the Consumer Contract without charge (other than regular usage charges) at any time up to 42 days after notice of the change was given.*

Because this rule is so specific, all Suppliers should ensure that their Consumer Contracts reflect it (unless those contracts are more favourable to the Consumer).

Exceptions to unfair terms rule

Rules 5.1.4 and 5.1.5 specify a significant list of exceptions to the 'unfair terms' rule. Significant exceptions include:

- 'Terms as to price, features or their performance or operation, which are accurate in all material respects, are not relevant to the assessment of fairness' (5.1.4);
- 'appropriately suspend, restrict or terminate a service in accordance with an acceptable use policy [provided that the acceptable use policy also complies with chapter 5 of the TCPC]' (5.1.5(a)(vi));

- 'limit a Supplier's liability for failure to perform due to an event outside the Supplier's reasonable control' (5.1.5(b));
- 'require payment of a security bond if there are reasonable grounds to believe the Consumer is a credit risk' (5.1.5(f));
- 'permit the Supplier to vary the price of a content or premium service where the Supplier relies on a third party for the service and the third party increases its price to the Supplier...', provided the service was offered with a clear statement that the price may change, reasonable notice of the change is given, and the Consumer can elect not to use the Service without incurring additional charges (5.1.5(j));

Rule 5.1.5(k) – Exception to unfair terms rule – Changes by Supplier's supplier

Rule 5.1.5(k) is of particular importance to resale Suppliers:

where the Supplier acquires a carriage service from a third party (other than its related body corporate) for resale [the Supplier may] vary a term in the Consumer Contract because of an amendment to its contract with the third party, if it:

- (i) *issues prior Written Notice to the Consumer, explaining the variation and its effect; and*
- (ii) *offers the Consumer the right to terminate the Consumer Contract within 42 days of the date of the notice, without incurring charges [other than usage or network charges up to the date of termination, or outstanding installation or equipment charges]*

This of course means that Suppliers need to ensure that their contracts with third party suppliers contain similar rights to end the service.

Chapter 6 – Billing

Chapter 6 is extensive and prescriptive. It is substantially similar to the Billing Industry Code that it replaces (C542:2003) except perhaps importantly, it is now limited by the new definition of Customer and does not apply to bigger business contracts in the way the superseded code previously did.

It specifies a wide range of requirements for bills issued by Suppliers, including:

- the physical appearance of the bill, including required contents (Rule 6.3);
- that Customers, at their request, be supplied with sufficient information to verify the accuracy of bills (Rule 6.4);

- a requirement that bills generally be issued within 10 working days after the closure of a billing period (Rule 6.5.1);
- not delaying the charging of another supplier in the billing chain by more than 95 days (Rule 6.5.4(c));
- not bill for charges older than 190 days from the date the charge was incurred by the Customer (Rule 6.5.4(d));
- that Suppliers may not generally charge for supplying billing information, except in a range of specific circumstances (Rule 6.7.1).

Interestingly, as these rules now only apply to a Customer (as noted above), it is possible, for example, to back bill big business customers after 190 days unless otherwise specifically agreed. Care should be taken when advising purchasers of telecommunications services to ensure these key elements of the old code are now captured by the contract with the service supplier.

Chapter 7 – Credit Management

As with the billing chapter, chapter 7 of the TCPC is prescriptive. Much of the super-

they make reasonable attempts to ascertain whether Customers understand verbal advice given to them (eg, this may require the use of interpreters if a Customer does not speak English), ensure that attempts to inform are directed to the Customer, and ensure that the method used to contact a Customer is acceptable and reasonable, based on the Customer's usage history (eg, calling a local call user, sending an email to an internet user, or sending a text message to a mobile phone user).

Complaints – advising Customers of external avenues of recourse

The complaints handling processes in chapter 9 of the TCPC are reasonably straightforward and pragmatic. The rules relating to complaints are broadly the same as under the superseded code. An notable aspect of rules 9.2.9 and 9.4 is the obligation they place on Suppliers to inform a complainant Customer of their 'external avenues of recourse'. These rules relate to complaints deemed by the Supplier to be 'frivolous' (Rule 9.2.9) or where a Customer indicates dissatisfaction with the Supplier's resolution of their complain (Rule 9.4). The TCP Guidelines list a number of agencies

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seded Credit Management Industry Code has been carried into the TCPC. Notable changes include the area of 'credit control tools':

- 'A Supplier must have credit control tools in place which the Supplier applies, without charge, for the purpose of managing a Customer's expenditure, where appropriate' (Rule 7.3.4); and
- 'A Supplier must make credit control tools available to Customers to assist them to manage expenditure' (Rule 7.3.5).

The TCP Guidelines list a number of examples of appropriate credit control tools, including call barring or restrictions, call charge advice during a premium service call, pre-paid services, hard caps (ie, pre-determined 'credit limits'), reduction of broadband internet speeds and independently notifying Customers once a particular spend level has been reached.

Suppliers are also obliged to comply with the credit management rules before they may refer a Customer to a debt collection agent, or list the customer with a credit reporting agency (Rule 7.4.2).

Suppliers must ensure that, before a service is restricted, suspended or disconnected,

that would qualify as 'external avenues of recourse', including the TIO, ACMA and Australian Direct Marketing Association.

Conclusion

Conveniently for Suppliers, because of the new TCPC, all the relevant regulatory aspects of dealing with customers (and consumers) are now in one place.

Whilst many of the rules in the TCPC remain the same as those that they replace from the 6 superseded codes, they are sometimes framed differently or have been written in a way that creates consistency across the board. Suppliers and their advisors should be aware of the TCPC and its application.

One of the most significant changes flowing from the TCPC is the narrowing of application of some chapters because of the single definition of 'Customer'; as a result, rules that previously applied to large businesses now may not. Advisers to businesses no longer covered by the TCPC should ensure that they are aware of the changes, and may need to advise their clients to adjust their contracts with suppliers accordingly.

The TCPC consolidates the consumer protection landscape for the telecommunications industry, and should ensure that the development of future regulation can occur in a more consistent and simpler way.