

From: [Craig Riviere](#)
To: [REDACTED]
Subject: FW: Scope & small business definition follow up paper -for discussion with ACMA, Nov 2023
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[REDACTED] . We pay our respects to Elders past, present and future.

[REDACTED]

Sent: Tuesday, 14 November 2023 6:29 PM
To: Craig Riviere <Craig.Riviere@acma.gov.au>
Cc: [REDACTED]
Subject: Scope & small business definition follow up paper -for discussion with ACMA, Nov 2023

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Hi Craig,

As you'll be aware, our members had concerns about the scope and application of the TCP

Code (a concern which is also relevant to the Financial Hardship Standard).

The attached paper builds on the previous conversations about this and hopefully explains the issues better. It includes a number of different options that might help us all move forward.

I would be keen to discuss this with you in the first instance.

[REDACTED]

Follow-up information for RC (encompassing RC Action 3.3)

This is an update to the Issue Paper: Scope and Application of the TCP Code which was provided to the RC prior to RC#2 and discussed both at that meeting and RC#3. It:

- briefly outlines the problem as originally identified,
- documents further discussions (at RC2 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.

Note: I have kept this paper separate from the Issues paper at this point so that it's clear what the issue is and new proposal. I'm envisaging that we'd merge the two once we get this to a position paper.

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). ([link to original paper](#))

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 impost 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 notes that the ACL spend threshold was increased in 2021 from \$40,000 to \$100,000 following the ACL review¹. 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 purchases².

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 productivity³. 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 Drafting Committee 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

¹ Treasury Laws Amendment (Acquisition as Consumer—Financial Thresholds) Regulations 2020.

² Australian Consumer Law Review – Final Report, March 2017, p. 73.

³ Australian Consumer Law Review – Final Report, March 2017, p. 73.

in 1986⁴ 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 cent⁵.

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 impost 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 impost 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'⁶ 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

⁴ 6401.0 Consumer Price Index, Australia, TABLE 8. CPI: Analytical Series, Weighted Average of Eight Capital Cities.

⁵ 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.

⁶ Refer to the separate Position Paper 'Essential Information' for information on this concept.

need to be implemented to 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 addition 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.