Attachment A: Analysis of, and response to, the key issues raised in the ACMA 8 April letter

Note: clause numbers in the DC response refer to the numbering in the updated Code, not the public comment version.

RESPONSIBLE SELLING, clauses 6.1.4 to 6.1.7	
A number of stakeholders have raised that the current drafting in this section is unlikely to be effective in reducing mis-selling.	
Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Overarching effectiveness of sales incentive clauses	The DC has made a number of adjustments to the Code to address identified issues and address effectiveness, as noted below. However, also note that all obligations within the Code must be read in the context of the whole Code – and other regulation that interacts with it. It is not appropriate to read the sales incentives clauses in isolation of the significant other protections provided to consumers through the customer journey. Of particular note in relation to sales incentive structures, these requirements must be read in conjunction with: • the overarching requirement is for CSPs to sell responsibly (cl. 6.1.1), • requirements in other chapters in relation to: o governance, policies, training, monitoring, o information provided to consumers pre-sale (including to those in vulnerable circumstances), o customer support, and, where things do go wrong, remedies.
• Clawbacks are ineffective deterrents as the sales representative may have left the company by the time the mis-selling is identified (clause 6.1.5(a)(i)) • Too much discretion is afforded to providers under clauses 6.1.5(a)(ii) and (iii)	To address these concerns, the DC has made several changes to both chapter 6 (Responsible Sales), and chapter 3 (Organisational culture and governance), which applies to all chapters of the Code. Changes include: • Tightening drafting at 6.1.2 to apply directly to a CSP's sales, rather than refer to its sales process. • Amending drafting in relation to the sales incentive structure requirements at 6.1.4 – 6.1.7 to: (i) include the concepts of: - 'proportionality' in relation to negative consequences for mis-selling, with the list of examples extended beyond clawbacks (6.1.5 (i)) - 'appropriate weighting' of customer feedback (6.1.5 (ii)). Note that these requirements are in addition to the clear requirement that disincentives must be **material**. These changes addresses ACCC's concerns that CSPs could set 'limitations' at an unreasonable level that would not act as a disincentive to mis-selling. (i) elevate the prohibition of sales incentives schemes encouraging sales staff to prioritise sales volume or value over consumer welfare and include a clearer prohibition on other misleading or unfair behaviour (6.1.5 (b)). This directly addresses the ACCC's concerns that the previous drafting, which specifically mentioned vulnerable consumers,

	signalled that sales for other groups could be prioritised over customer welfare, and would disincentivise sales representatives from assessing a customer as vulnerable (which was not the intention). (ii) expand requirements for monitoring and review to include a requirement to ensure that incentive structures do not create undue pressure on sales staff or result in harmful practices for the consumer (6.1.6). • Updating clauses 3.2.8 and 3.2.9 to include specific requirements in relation to mis-selling identified during monitoring.
• There is no minimum standard for metrics (clause 6.1.5(c))	The DC does not consider it possible to include a minimum standard for metrics without prescribing incentive structures. This is both arguably inappropriate in a Code, and impossible; the Code applies to CSPs of all sizes, with different business models, structures, offerings and sales channels. Customer feedback opportunities and mechanisms will vary. It is also not necessary. The requirements and expectations on CSPs are clear, both in relation to the penalties for individual sales staff, and for the CSP more broadly (e.g. through the remediation requirements).
• Transparency about sales incentive structures is needed to raise consumer awareness prior to entering into purchase discussions with CSP staff.	The Code's requirements to responsible selling bolster ACL requirements and provide the necessary protections. This approach is consistent with that taken by the water, electricity and gas sector. CA also proposes to include information about responsible selling requirements in the TCP Code consumer document. It is unclear what further requirements would achieve, or exactly what is being suggested, noting that CSPs will likely have dozens of different incentive structures in place for different channels and business models, and even ignoring issues of confidentiality, is doubtful that a consumer would be interested in, or would benefit from, looking at the detail. There is already information overload during the sales process. Note also that the ACMA may ask to see a CSP's sales incentive policies, allowing it to assess the balance and reasonableness of any structures in place.

RESPONSIBLE SELLING, clauses 6.1.11 to 6.1.17

Some stakeholders have raised concerns that too much discretion is given to CSPs regarding remedies.

Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• The draft Code relies on excessive use of guidance notes for remedies for mis-selling which weakens the protections (clause 6.1.11) • Consumers should not be required to accept a specific remedy or penalised for choosing one	These concerns have been addressed: • This section has been restructured to elevate the note to a clause (new cls. 6.1.13 and 6.1.15). • The right to a refund requirement has been elevated from a note to a clause. (new cl. 6.1.15).

over another, and this right should be codified rather than left as a guidance note (clause 6.1.11)	
• Consumers should not need to prove vulnerability at the time of mis-sale (clause 6.1.15) as they may find it traumatic or impossible to prove that their vulnerability was present at the time of the mis-selling, and this should not preclude them from accessing remedies	This section does not <u>require</u> a CSP to ask for proof of vulnerability; rather, it allows flexibility to assist customers on a case-by-case basis. This approach to evidence is consistent with government and utility-providers' policies, where some form of evidence of vulnerability or difficult circumstance is required before consumers can access government discounts, concessions, fee waivers, etc., or access utility hardship programs. This ensures assistance goes to those who need it most and reduces the risk of fraud. This drafting is also consistent with the Financial Hardship Standard (FHS) and draft DFSV Standard.
• Remedies for consumers in vulnerable circumstances should include consumers whose vulnerability stems from mis-sale	There does not appear to be any gap, and we contend that overall, the protections are robust: a customer who is vulnerable as a result of a mis-sale will be eligible for protections under cl. 6.1.13, which would need to be appropriate and tailored.
• The 10-working day timeframe is too long to provide a remedy for customers experiencing debt and hardship (clause 6.1.17) – government and consumer advocate stakeholders recommended 5 working days as a more appropriate timeframe.	Cl. 6.1.17 (now 6.1.22) has been updated to align with the recently updated Complaints Handling Standard.

MOBILE COVERAGE

Some stakeholders considered that the pre-sale information about mobile services and coverage, and associated remedies, are insufficient to adequately protect consumers.

Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Pre-sale information about mobile services and coverage (clause 6.1.10) is insufficient to adequately protect consumers – the provisions only apply to 'assisted sales', and only requires the staff member to 'prompt the consumer to check' coverage in critical locations that the service is intended to be used.	Drafting in this section has been updated for clarity and to address identified issues: • A new clause has been added (6.1.11) to require prompts during digital sales. Note: o It is not possible to prompt a customer to check for coverage in all circumstances; for example, when purchasing a service via an unassisted channel. o The requirement to 'prompt' is appropriate; It is not possible or necessary for a CSP to force a customer to check coverage in every situation; they may already have ascertained that the coverage is appropriate (previous experience; asking friends; consulting a coverage map). o Critically, the consumer is protected in any event through the remedy requirements.

• Stronger protections and remedies are needed where mobile coverage does not meet a consumer's requirements (clause 6.1.13). Specifically: o the Code does not specify what it means for the CSP's coverage to "not meet the customer's coverage requirements" o where there is a reference to CSP mobile coverage maps, it is unclear if the remedy at clause 6.1.13 (remedies for incorrect information on mobile network coverage) will apply, and therefore afford protections to consumers where the maps do not match	Drafting updates have been made to address these concerns: • Remedies for coverage reasons have been separated from those for inaccurate information. • cl 6.1.17 has been updated, with the phrase 'experienced mobile network coverage' replacing 'actual mobile network coverage', and reference to coverage maps removed. This makes it clear that remedies must apply based on actual customer experience rather than incorrect information on a coverage map, significantly uplifting the protections and addressing most of the concerns raised by CSPs, government and consumer advocates in this area.
• Provisions in the code are unlikely to be effective because drafting does not address how a CSP must treat situations where a consumer cancels their mobile service, but the service is linked to a contract that also includes a device.	The DC does not consider it reasonable to <u>mandate</u> that a customer must be able to return a device linked to a service, other than where a vulnerability affected their purchasing decision (where device return is required, under cl. 6.1.18) because: • A device is different to a service, in that a device can be used on another network. • Where a cancelled service results in a customer needing to pay out a device immediately, and that presents a financial difficulty for that customer, existing obligations require that a CSP must work with the customer to agree on an arrangement to allow the customer to pay the handset off over time (while using the handset on another network). • It is reasonable to allow CSPs to review the circumstances on a case-by case basis. This allows a CSP to: o work through fault resolution processes (this may resolve issues thought to be related to network coverage), o ascertain that the device is in good working order, o assess fraud risk. We note that several CSPs already have 'coverage guarantees' in place, reviewing what is appropriate on a case-by case basis. To mandate this is inappropriate and we consider would give rise to considerable fraud.

CREDIT ASSESSMENTS	
While government stakeholders and consumer advocates were supportive of the expanded credit assessment obligations, they considered the drafting is insufficiently prescriptive to adequately protect consumers from being sold products they cannot afford and the requirements do not provide appropriate safeguards compared to other sectors.	
Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Provisions do not provide adequate safeguards compared to other sectors	The proposed TCP Code provisions are more stringent than rules apply to sectors that have been identified as 'comparable' by various stakeholders: • 'essential services' (water, gas, electricity) are not subject to <u>any</u> mandatory credit checks. This recognises that credit checks can act as a barrier to accessing the services, including for young people who may not yet have a credit score. As noted in the body of the cover letter, declared essential services also benefit from government support for low income or vulnerable consumers. As very clearly articulated in numerous industry submissions, advocates cannot argue for enhanced consumer protections while simultaneously introducing barriers to access. • Consumers who fail credit checks may turn to buy-now-pay-later (BNPL) offerings or other riskier credit alternatives. Even with the proposed new BNPL rules, such alternatives have considerably lower barriers to credit than those in this proposed new TCP Code, with much less favourable terms (for example, payment-over-time arrangements for telco products are universally offered at no interest; this is not the case under BNPL arrangements.) • Protections need to be considered in context: o There is a wide range of telecommunication services and products available at multiple price points to suit different budgets and needs. o Requirements for responsible selling in the Code beyond the credit check require CSPs to assist consumers find products to suit their needs, including their budget, and to ensure representations are not misleading. Consumers must be afforded some agency and responsibility for their decisions and actions, noting that the Code offers clear protections for all consumers, with *additional* protections for those in vulnerable circumstances.
• Credit check provisions need to be more prescriptive, and/or extended, to protect consumers from being sold products that they cannot afford	The DC does not believe that consumers would be protected from being sold products that they cannot afford through the Code's requirements on credit checks being more prescriptive or extended. Indeed, CA contends that such requirements would be both directly and indirectly detrimental to consumers. This is because an external credit check cannot provide the information to CSPs that several stakeholders appear to believe it can: • Comprehensive credit reporting, which involves detailed sharing of customer credit repayment history and hardship arrangements, is restricted to accounts with entities that hold an Australian Credit Licence, issued by ASIC.

	Telcos are not financial institutions and do not have access to this information. The majority of CSPs operate in a negative credit environment only have access to see: o a credit enquiry has been made and the number of credit enquiries over the last 5 years; o a default listing or serious credit infringement has been recorded against the customer by a credit provider; and o anything in the public record of information such as bankruptcy, judgement, summons. • An external credit check will not provide information about the consumer's broader liabilities, including: o how many other financial commitments a consumer has, including whether a customer is active with another telco; o whether a customer has entered a financial hardship arrangement with a financial institution or another telco (this information would be available to financial institutions running a credit check), o anything else that would indicate that a customer can afford a product. • Performing external credit checks may be detrimental to a consumer's credit record: o A consumer's credit score may be reduced by 5 points per external check completed. o a poor credit score lowers an individual's chance of approval for loans, credit cards and mortgages, or can result in an approved loan but with a higher interest rate. • There can be a significant lag between a consumer starting to experience problems and this showing up as a default in their credit check. For example, lodgement of a telco default can take up to six months once all the mandatory notices have been issued. CSP experience is that a customer's negative credit check score will rarely change within 6 months. Noting that a CSP has payment history for these consumers (which is a more reliable indicator of capacity to pay, as described above), **the DC has therefore proposed in the attached draft that the timeframe for credit checks be increased from 6 to 12 months.** • Smaller CSPs will be disproportionately affected by credit check costs; one provider advised us that the direct cost of a credit check to them, as a smaller provider, was **three times higher** than it is for bigger providers, as the Bureaus' pricing regimes are based on volume, quoting that the cost was $1.50 per check for them, as opposed to $0.50 for the bigger providers. Another CSP advised that they are paying **even more** - $3.80 per check. This is in addition to the indirect costs of running credit checks. With already small margins in the industry, extra credit check requirements threaten smaller CSPs' viability. Reduced competition is not in consumers' interest.
• A proposal for credit thresholds to be increased from $150 to $300 to align with recommendations in the Review of Australia's Credit Reporting Framework – Final Report.	The DC agrees that the $150 threshold is too low and has amended the residential customer thresholds to $300 to align with the updated Credit Reporting Code. However, based on our analysis of all the issues raised in the public consultation feedback (direct and indirect costs; damage to consumers' credit scores, etc. – as detailed below), **we recommend this is increased to $500**, and ask the ACMA to consider this.

• Credit assessments should not be limited to cases 'where a debt may be pursued by the CSP' (clauses 6.2.1(b), 6.2.3(b), 6.2.5(b) and 6.2.9(b)) – in these situations, the consumer remains at risk of financial over-commitment, disconnection, accruing of debt, and potentially a default being listed against their credit score.	Contrary to some stakeholder's feedback, the limitation does not mean that the consumer is at risk of accruing of debt, and potentially a default being listed against their credit score; if no credit check has been undertaken because the CSP has a policy of not chasing the debt, and the consumer does not pay, the CSP would be in breach of the TCP Code if they pursued any debt owing. **The consumer is protected from debt collection and default risk.** Removing this limitation would result in CSPs being required to conduct external credit checks in circumstances in which there is no ongoing debt risk to the customer. Additionally, CSPs have low value plans where it would cost more than any possible debt owed to conduct a credit check in the first place, and certainly to chase it. Thus, a CSP may have a policy that it would not pursue debt in certain circumstances. It would also have policies that prevent debt from accruing beyond a specified threshold. The obligations in other responsible selling clauses under Chapter 6 are designed to address the other concerns raised.
• Requiring providers to merely 'consider' the consumers financial situation does not provide for appropriate safeguards compared with other sectors (clauses 6.2.2(a), 6.2.4(a), 6.2.6(a) and 6.2.10(a))	The Drafting Committee has amended the clause to make language clearer that CSPs must 'take into account' rather than simply 'consider' a consumer's circumstance.
• Discretion for CSPs to determine 'affordability indicators' is too broad (clause 6.2.2(a)(iii) and 6.2.6(a)(iii))	The Drafting Committee has amended 6.2.6 to provide additional protections and to require a CSP to conduct a review of a customer's payment history ***and*** take into account: the customer's financial circumstances or ***at least 2*** affordability indicators.
• credit assessment for existing residential customers (clauses 6.2.6) is concerning as it lists the matters CSPs must consider as alternative options rather that as separate mandatory criteria, as for new residential customers in clause 6.2.2(a).	CA does not believe that is necessary or helpful to require that existing customer checks mirror those for new customers, or to be more prescriptive about the checks undertaken. The risk to (and from) existing customers is **substantially** different to the risk to/from new customers, as the CSP can historical information in the form of the customer's payment history. This is much more useful and reliable information than an external check for all the reasons explained above.

PAYMENT METHODS	
Stakeholders raised issues relating to the new payment method requirements.	
Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Free manual payment methods should apply to all telco products, not just services (clauses 8.10.1 and 8.10.2)	The DC agrees. We have amended the wording of the sub-heading for clarity, but believe that this is already covered in the drafting of 8.10.1 and 8.10.2; it applies to all telco products (both goods and services).
• Consumers should be allowed to choose the date and frequency of their direct debit payments (clause 8.10.3) – current drafting is unlikely to meet consumer expectations.	The DC does not consider mandating all three methods to be proportional or reasonable. To build this capability would require significant cost and be incredibly complex for CSPs. Moreover, we do not believe that making direct debit requirements more prescriptive would provide a clear consumer benefit: • the costs to comply with all the new requirements in the Code are already prohibitive and risk the viability of smaller CSPs (which is ultimately to consumers' detriment). • the desired consumer flexibility is already achieved via these requirements and the supporting requirements for consumers to be provided flexibility (primarily through the manual payment method requirement): o The options at 8.10.3 require CSPs to provide consumers flexibility in direct debit payment timeframe while taking into account the many different types of service offerings in the market, as well as varying CSP business models and capabilities. Many CSPs will not have billing platforms that will be capable of allowing customers to always choose the date of their payment and frequency. For example, some smaller CSPs will only have the capability to do one monthly bill run for all customers. Similarly, some plan offerings are provided on an annual basis and are not designed for more frequent payments. o The requirement to offer manual payments in 8.10.2 will also deliver customers flexibility around frequency and date of payments (provided the payment is made before the due date). o Consumers can shop around for the payment arrangements and timing that suit them best. Additionally, we note that these new requirements are designed to improve consumer experience with direct debit payments. They are supported by other requirements to provide for customer flexibility.
• A timeframe is needed for notice of a failed direct debit payment (clause 8.11.3)	The DC has added a 3-day timeframe, as requested (see cl. 8.11.6 – previously 8.11.3)

• 15 working days is too long for providing refunds for direct debit errors (clause 8.11.5). The timeframe would be better aligned with the 10 working days timeframe for resolving a complaint in the consultation draft Telecommunications (Consumer Complaints Handling Standard) Industry Standard.	The DC has updated the timeframe in the breakout box under 8.11.11 (previously 8.11.5) to align with the new Complaints Handling Standard.

DISCONNECTION	
Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Disconnection provisions are insufficient to protect consumers affected from loss of service (clauses 9.1.1 to 9.1.3) • Exemptions for reconnection are too broad, especially 'uncontactable customer' (clause 9.1.1). We strongly consider the drafting to determine whether a customer is contactable should require CSPs to use the same assessment for 'uncontactable' as required under the subsection 24(3) of the Financial Hardship Standard	Concerns about clauses 9.1.1 to 9.1.3 appear to relate to unclear drafting. The DC has addressed these concerns by: (i) Including a requirement to reverse the restriction, suspension or disconnection 'as soon as reasonably possible'; (ii) Removing 'where a customer is uncontactable' from the guidance note. (iii) Including a new clause that a CSP will not be in breach if the CSP does not have a contact number, email address or other method to contact. This reflects that 'uncontactable' in this circumstance is different to the circumstances in the Complaint Handling Standard, whereby a CSP has a contact method, but a customer is not responding to attempts by the CSP to reach them.
• Natural disaster provisions lack specificity (clause 9.1.3)	The DC has clarified the requirements at 9.1.3 to: (i) amend drafting in relation to the new natural disaster clause, making it clear that this relates to credit management; (ii) include a new definition of 'natural disaster' in the Code. Note that this is a new clause to fill a gap in protections that industry identified and saw fit to include within the TCP Code. Other protections as they related to natural disasters are covered within other instruments.

• Credit notice timeframes are too short (clause 9.3) – the 5 working day should be changed to 10 working days to align with the Financial Hardship Standard.	In relation to the final bullet, the DC has updated most of the TCP Code timeframes to align with the new timeframes in the Complaints Handling and Financial Hardship Standard. However, it does not believe it appropriate or in the customer's interest to increase the credit notice timeframe to align with these instruments. As explained in previous discussions, this is because, unlike the FHS, which requires 10 days' notice for one specific action, the timeframes in the Code apply to each step in the credit management process. Requiring each of these timeframes to be 10 working days could result in very long timeframes where stacked, which could increase debt owed and therefore consumer detriment. However, where a consumer is in financial hardship, the longer timeframe will apply.

CSP-INITIATED CONTRACT CHANGES

Consumer and government stakeholders contend that consumers should be notified of all CSP-initiated contract changes, as the consumer is best placed to assess whether they are negatively impacted.

Specifics, as identified in ACMA letter	***Drafting Committee (DC) Response***
• Consumers should be notified of all CSP-initiated contract changes as the consumer is best placed to assess whether they are negatively impacted.	The DC has reconsidered this issue, reviewing the numerous submissions by industry and other stakeholders, and continues to hold the view that it is not in consumers' best interests to extend the obligation to cover every possible change to a contract. Doing so would impose a disproportionate burden on CSPs, without delivering a clear or measurable benefit to consumers. In fact, notification fatigue may result in consumers overlooking or ignoring important notifications — including those that could have prompted them to exercise their right to cancel the contract in response to a detrimental change, which undermines the intent of the protection, and those that could be critical for other reasons (outage communications, payment reminders, etc.). Additionally, the obligation to inform customers about a detrimental change to their contract is clear and unambiguous, making compliance and enforcement clear. It is consistent with requirements for other sectors (the banking industry is only required to notification a customer of detrimental change), and the practical reality of expanding the rules would result in CSPs being required to inform customers of changes that will have no discernible impact on the customer, for example, changes to IT systems or third-party arrangements.